

**“The Future is Medieval”: Orality and Musical Borrowing in the Middle  
Ages and Online Remix Culture**

(Monograph)

by

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## Abstract

This thesis re-situates sampling and the mashup in a broader tradition of musical borrowing and oral practice. Musical creators in the West borrowed throughout history; the variety and quantity of this borrowing remains dependent on the proprietary status of music. Copyright was first applied to music to protect printed scores, and is thus ill equipped to accommodate works that borrow recorded elements. Taking Ong's concept of "secondary orality" as applied to hip hop by Tricia Rose, this thesis connects techniques of musical borrowing in the Middle Ages with those in the late-20<sup>th</sup> and 21<sup>st</sup> centuries through several close readings of representative works. By necessity, these orally circulating works are shared within a knowing community, one that understands the references and values continuing dialogue more than the contributions of individuals. Finally, this thesis makes recommendations for copyright reform, seeking to ensure that music with borrowed parts can continue to circulate in both commercial and non-commercial spheres.

## Keywords

Orality, Music, Copyright, Authorship, Borrowing, Remix Culture, Middle Ages, Refrain, Mashup, Sampling.

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## Chapter 1: Borrowing as Oral Practice

This thesis resituates the mashup and the products of music remix music culture in a broader tradition of oral music practice. Musical borrowing took place before notation could record it, and it is still practiced in music cultures around the world (most of which are oral)<sup>1</sup>. Recently, musical borrowing has been misrepresented in law as infringement, as a physical taking from pre-recorded music. However, re-situating borrowing as a long-established oral practice demonstrates that it is necessary to subsequent musical creation. Legal reform reflecting this change would promote creativity and enrich the continuing dialogue on culture.

By searching the past for useful ways to understand the present-day tension between copyright and the mashup, I use the same methodology as musical borrowers. I place old ways of thinking in dialogue with new ones, seeking to understand present conflicts and challenge past assumptions. I seek connections in unexpected places, and offer the insights of a cultural period that is not intuitively connected to the high-tech mashup culture of forums and downloading. Indeed, at first blush the Middle Ages seem to be a strange choice for my historical precedent, yet Medieval concepts of originality and the value of cultural dialogue are consistent with the attitudes of online mashup communities. Copyright first lent its protection to music to *promote* creativity, though it is now used to justify claims that limit it. Taking a broad historical approach to this problem reveals that music copyright no longer serves its original purpose. Those who object to the mashup are

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<sup>1</sup> Although notation was developed in Europe, India, China, Japan, and Indonesia, other music cultures rely on oral transmission, and use notation in tandem with an oral tradition.

historically forgetful (or ignorant), and this thesis seeks in part to reveal how concepts of originality in music came to be naturalized and accepted. After revealing and destabilizing current ideas of originality and the proprietary status of music, I make historically informed recommendations for how copyright might better accommodate musical borrowing.

Borrowing is a musical *practice*. Musical creators borrow because they mean to communicate something by doing so. Although it deals in musical works, ones that may be fixed in notation, borrowing occurs in acts of *speaking* and *hearing*. Because it is a practice, and one that can function without notation, borrowing is oral. It is a method of speaking in different ways at one time. Borrowing places new and old songs beside each other to foster dialogue between them. Thus musical borrowing cultivates criticism of past works, leaving no work immune to critique. Musical borrowing also creates dialogue within music communities, because works are transmitted orally (or by secondary orality). Musical borrowing *may* result in musical objects, but it does not depend on them. As I discuss in Chapters 2 and 4, copyright was developed to protect objects, be they literary or musical, and does not accommodate an oral music practice.

This introductory chapter establishes my theoretical frame, synthesizing Walter Ong's model of orality with Linda Hutcheon's definition of parody and Bakhtin's double-voicedness, to explore how musical works with borrowed elements make meaning. These theories support my claim that borrowing operates as practice and not as object, as process and not outcome. In all cases, I apply these literary concepts to music, accounting for the specificity of the sound medium. I justify my preference for the term "borrowing," demonstrate its oral character, and discuss how repetition creates value. The chapter

considers what it means for musical creators to use recognizable materials, and how musical borrowing creates meaning through listeners' dual tendencies towards *plaisir* and *jouissance*. The musical work with borrowed elements is similarly split, according to Bakhtin's theories of dialogism and heteroglossia, and characterized by the interaction of musical languages. Artists either allow these languages to converse, or use borrowing to demonstrate that some languages are simply incommensurable. Linda Hutcheon's reading of Bakhtin on parody similarly constitutes parody as a way of speaking. It is an act of placing old and new elements together, often with critical intent. Finally, I establish four reasons for musical borrowing that persist throughout the history of Western music, providing each an example from both the popular and art traditions.

First, it is necessary to address the question of naming this musical practice. I am not discussing Kristeva's "intertextuality," Bloom's "influence" or "quotation" in general, though in a project of a larger scope, these are surely theoretical concepts I would need to confront individually. I have instead settled on a term that I feel is reflective of the practice in music specifically, given a tradition of usage in musicology. Some have eschewed the term "borrowing," because the "borrowed" materials are not returned, strictly speaking.<sup>2</sup> Aram Sinnreich identifies a variety of terms used to describe sampling, all of which are equally applicable to musical borrowing more generally. He writes,

Sampling isn't 'taking,' because the source material is still available, intact, in its original form. It's not 'borrowing' because the sampler doesn't ever return the work, except in a holistic sense. It's not 'quoting' because (a) it's the mediated expression itself, not merely the ideas behind it, that's being used, and (b) the output often bears little or no resemblance to the input.<sup>3</sup>

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<sup>2</sup> And, in popular music studies, because the word is associated with musicology.

<sup>3</sup> Aram Sinnreich, *Mashed Up* (Boston: University of Massachusetts Press, 2010), 124. At the end here, Sinnreich references works that are comprised mostly or entirely of samples transformed beyond

Despite the diversity of Sinnreich’s terminology, in all cases, “sampling” is an act. Joanna Demers coins the term “transformative appropriation”: it accounts for both the origin of the material and its function in the new work.<sup>4</sup> McLeod and DiCola locate a productive tension in her descriptor, identifying the conflicting positive connotations of “transformative” with the negative ones of “appropriation.”<sup>5</sup> Despite its nuance, Demers’s term sounds clunky, and more importantly it isolates sampling from the broader tradition suggested by the term Burkholder describes. Yet, J. Peter Burkholder’s comprehensive article on Grove Music Online refers to the overarching practice as “borrowing,” though he does acknowledge a variety of more specifically-named practices, including paraphrase, contrafact, cantus firmus technique, quodlibet, and collage.<sup>6</sup> Thus I have decided to use the term “borrowing” in order to align the newer musical practices exemplified in sampling and the mashup with the established traditions of “Western art music,” embracing Sinnreich’s idea that the borrowed work is potentially returned “in a holistic sense.” I also wish to invoke John Milton, who claimed that borrowed materials must be “bettered by the borrower.”<sup>7</sup> Slightly later, John Locke echoed this attitude in his *Second Treatise of Civil Government*, that after mixing his labour with property, “no man but he can have a right to what that is once joined to, *at least where there is enough, and as good, left in common for*

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recognition. For the project at hand, I wish to focus on works in which recognition is an important element of meaning.

<sup>4</sup> Her language is inspired by the *Campbell v. Acuff-Rose* decision, discussed at length in Chapter 4. Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity*, (Athens: University of Georgia Press, 2006), 7.

<sup>5</sup> Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Durham, NC: Duke University Press, 2011), 7.

<sup>6</sup> In the first section, “Types of Borrowing.” J. Peter Burkholder “Borrowing: Types of Borrowing,” in *Grove Music Online*.

<sup>7</sup> John Milton *Eikonoklastes: An Answer Eikon Basilike* (London: A. Millar in the Strand, 1756), 77. Accessed at [find.galegroup.com](http://find.galegroup.com). Notably, John Oswald published a version of his “Plunderphonics” essay (referenced later in the present chapter) under the title “Bettered by the Borrower,” yet another association I would like to invoke.

others.”<sup>8</sup> Though this does not exactly constitute returning the work, there is a sense that in if the borrowed material is not literally “returned” to its original creator, at least the borrower has left enough from which the original creator can benefit (when applicable), and something yet for subsequent creators to use in different ways.

Though borrowing may be preserved in musical objects, it is not identical to them. To return to another aspect of Sinnreich’s quote, musical borrowing does present “the mediated expression itself”; the creator uses the sonic medium, either presenting the thing itself in the form of recording (albeit beat-matched, transposed or truncated), or melody<sup>9</sup> re-articulated (again, either in augmentation or diminution, transposition, or fragmentation). The treatment of musical borrowing as though it were a purely *literate* practice denies its active, oral character. It is as if borrowing constitutes a physical taking from score or recording (both recently considered forms of “writing”)<sup>10</sup> rather than a purposeful act of musical expression. A misunderstanding of borrowing as a literate practice assumes that a piece of music is identical to its score (or other “written” versions, as in recording), something that even the most conservative musicologists do not accept. While the score does successfully preserve music, it does not notate everything. It prescribes pitch and rhythm, and suggests, to a lesser degree, elements such as tempo, and dynamics. Timbre and groove, however, cannot be notated, nor can the interaction of

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<sup>8</sup> Emphasis added. John Locke, *Two Treatises of Government*, “On Property,” (Whitmore and Fenn, and C. Brown, 1821), Section 27, 210. Accessed at books.google.ca

<sup>9</sup> In the Western art music tradition, melody is the most frequently borrowed element. However, when artists borrow from recordings, they often choose from a variety of musical elements, including melody, rhythm (usually in the form of a break beat), and timbre (both instrumental and vocal). The condemnation of contemporary borrowing may in part be due to its incorporation of these other elements.

<sup>10</sup> I have self-consciously responded to the language of Bridgeport here: “When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.” See *Bridgeport Music v. Dimension Films*, discussed at length in Chapter 4.



musical elements realized in sound. Artists who sample, especially those in hip hop, prefer borrowing passages characterized by timbre and groove, the elements that cannot be notated. In art music, indeed, a composer might have to re-inscribe a borrowed passage in pitch and rhythm, but the true reproduction must happen in sound. In this way, the performer and the score are interdependent: without the performer to interpret and translate the notation into sound, a score remains a mere suggestion of music. To be fully realized, borrowing takes place in speaking and hearing, in the statement of a borrowed element in musical *sound*, and its reception and identification by an audience. If one wishes to quote a previous work of literature, one may simply use the words, re-inscribing them in the same medium in which they were originally written. The same is true of visual arts, and to a lesser degree, film. In music, however, the process is only complete when the borrowed work is realized in sound, and not when it is inscribed as visual representation in score form. Thus musical borrowing is enabled by, and emergent from, oral practice. A strict consideration of this borrowing as tied to music literacy (i.e. the use of scores) does not acknowledge how and why musical borrowing takes place.<sup>11</sup>

In *Orality and Literacy*, Walter Ong explores the relationship between oral and written culture, which can be complicated by coexistence and interdependence. Oral cultures are more likely to contain borrowed elements for a variety of reasons including ease of transmission and retention by memory. When discussing the narrative forms of an oral tradition, Ong dismisses the word “literature,” preferring instead “text,” for its various rich associations:

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<sup>11</sup> I discuss reasons for borrowing later in this chapter.

‘Text’, from a root meaning ‘to weave’, is, in absolute terms, more compatible etymologically with oral utterance than is ‘literature’, which refers to letters etymologically/ (literae) of the alphabet. Oral discourse has commonly been thought of even in oral milieus as weaving or stitching—*rhapsōidein*, to ‘rhapsodize’ basically means in Greek ‘to stitch songs together.’<sup>12</sup>

“Text” suggests the *act* of weaving, while “Literature” signifies physical inscriptions of the alphabet. Singers and poets “stitch together” pre-existing materials in cultural contexts that either have not established or do not valorize the “author” or the “work.” Leo Treitler sought to understand the transmission of the Medieval chant repertoire through similar acts of “stitching”:

If the singer has accumulated a repertory of standard formulas, each serves him when his knowledge of theme and formulaic system calls for a phrase of its characteristics. They belong to the complex of habits and associations that enable the singer to compose at high speed...[T]hat is not to say that the technique of oral composition depends on the singer’s retention of a stock of standard formulas which he strings together.<sup>13</sup>

Thus Treitler’s singer “strings together” melodies “compose[d] at high speed” in the same way that Ong’s oral storyteller “weaves” a text or an epic poet “stitches” songs. The resulting musical work is fleeting since it is not fixed in any object.

In oral music cultures there is no static or definitive sense of a “work”—there are merely versions told and performed at different times, tailored to the needs of the specific context. Medieval cantors recognized the mode of a chant, the subject matter, the elevation of the feast day, and (re)created an appropriate melody, based on remembered models and a knowledge of convention—much in the same vein that a jazz musician might improvise in a mode or on a given melody. But Treitler’s transmission model may not have taken place without any interaction with notation. Indeed, even though early notation functioned

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<sup>12</sup> Walter Ong, *Orality and Literacy* (New York: Methuen, 1982), 13.

<sup>13</sup> Leo Treitler, “Homer and Gregory,” *The Musical Quarterly*, 60 No. 3 (July, 1974), 356.

primarily as a mnemonic device, singers still needed to fill in the pitches and contour of a chant melody. Before the invention of the staff, oral and written processes interacted in the transmission of music.

Milman Parry and Albert Lord, whose oral-formulaic theory influenced both Ong and Treitler, believed that the formulaic structure of epic poetry revealed its oral composition. When discussing Homeric formulae, Ong recalls Parry's discovery that the epithets for wine changed for purely metrical purposes, rather than for narrative or descriptive ones.<sup>14</sup> The poet inserted the appropriate epithet based on metrical context, not for complicated symbolic reasons, reusing formulae when the conditions required it. These epithets were used frequently and were easily adaptable, able to move from work to work. At times, it is impossible to say where the threads of one text end and those of another begin, making the accepted concept of intertextuality nearly unintelligible.

Any discussion on oral transmission and borrowing should address the oral-formulaic theory, since without the work of scholars like Parry, Lord, and Treitler, no discussion of oral poetry or music would be possible. In her book *Oral Poetry*, Ruth Finnegan responds to the oral-formulaic theory, challenging Parry and Lord's conclusions with her own findings, which include studies of oral transmission and composition in musico-poetic cultures across the world. Works like *Beowulf* and the *Chanson de Roland*, she argues, exhibit formulaic construction, and yet were composed in writing.<sup>15</sup> Parry and Lord are imprecise with their terminology, never providing a firm definition of the epic

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<sup>14</sup> Adam Parry 1971, in Walter Ong, 21.

<sup>15</sup> Ruth Finnegan, *Oral Poetry* (Cambridge: Cambridge University Press, 1977), 67-68.

formula.<sup>16</sup> Finnegan does, however, examine the circulation of Medieval *refrains* in the ballad; it is the purposeful borrowing of a passage from another work, restated word-for-word (or close to it), that is most relevant to the present discussion of musical borrowing. *Refrains* and stock situations migrate from song to song, tailored to accommodate specific performance conditions. Though transmission and composition are closely linked at this point, Finnegan asks whether changes in the ballad repertoire take place during composition (as Parry and Lord suggest), or during transmission (more closely associated with performance).<sup>17</sup> In other words, changes in the ballad may take place in the creation of an object through composition, or in the use of the object, through performance. Like Finnegan, I limit my focus on purposeful acts of musical borrowing that gesture towards known or knowable originals, rather than the oral composition of works of formulaic construction. Both the oral-formulaic approach and my present method require the involvement of a musical community. The former assumes the work is the product of a faceless community or tradition, while the latter is concerned with how the borrowed elements are recognized and exchanged meaningfully within a community.

It is difficult for some modern listeners to accept musical works with borrowed elements as “original.” Ong concedes that such a notion of creativity would be difficult to accept as a member of a literate culture, asking “How could any poetry that was so unabashedly formulary, so constituted of prefabricated parts, still be so good?”<sup>18</sup> In oral culture, he suggests, valued passages were repeated for the sake of preservation. The Medieval *refrain*, like a proverb, provided succinct wisdom in a poetic form, and they were

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<sup>16</sup> Finnegan, 71.

<sup>17</sup> Finnegan, 148.

<sup>18</sup> Ong, 23.

frequently reused for this reason.<sup>19</sup> Members of what Ong calls a “secondary oral culture,” defined by television, radio, and other mediated “oralities,” re-use materials for different purposes. For them, it is *because* something is good that it is repeated.<sup>20</sup>

If musical borrowing is an oral practice and consists of speaking and hearing, it is necessary that speakers and hearers understand one another. Creators *mean* something by borrowing a specific musical passage, and in meaning something, they seek to be understood. Listeners must first recognize that an element *is* borrowed, so that they can interpret it according to its new context. After this, they must also recognize the original source of the borrowed material. For example, in their song “Otherside,” Macklemore and Ryan Lewis sample the opening guitar riff of the Red Hot Chili Peppers’ song of the same name. Macklemore and Ryan Lewis’s “Otherside” begins with the sampled guitar, forward in the mix, and immediately recognizable to any listener who knows the Chili Peppers’ original. The lyrics of both “Otherside”s discuss addiction and self-destruction, the original in rock, and the sampling song in rap. Both Anthony Kiedis of the Chili Peppers and Ben Haggarty (stage name Macklemore) use their confessional lyrics to explore personal struggles with addiction. Without even referencing the lyrics of the Chili Peppers’ “Otherside,” Macklemore and Ryan Lewis know that their listeners will recognize the sample, and connect their “Otherside” with the images of addiction expressed in the original. The sample’s reference is meaningful both to the speaker and the hearers. Borrowing from a more obscure song jeopardizes the audience’s identification of the

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<sup>19</sup> See Richard Taruskin, *The Oxford History of Western Music* vol 1, 120, in Jennifer Saltzstein, “Relocating the Thirteenth-Century Refrain: Intertextuality, Authority, and Origins.” *Journal of the Royal Musical Association* 135 no. 2 (2010), 246.

<sup>20</sup> As in the case of sample-based music, mashups, graffiti with “borrowed” elements (like that of Banksy), and the internet meme.

sample, although it may also be meaningful to the creator. After the sampling lawsuits discussed in Chapter 4, artists' ability to use recognizable samples, a basic condition for intelligibility, comes under fire, because the most recognizable samples become the most costly to license.

After considering the act of "speaking" in musical borrowing, I now shift my focus to the act of "hearing." As argued above, it is crucial that listeners recognize the sources for musical borrowing, and that they take pleasure in this recognition. When borrowing is practiced successfully, "Everything comes about, indeed, in every sense everything *comes—at first glance*."<sup>21</sup> Barthes describes the reader's (or here, listener's) recognition of an intertextual reference, and the pleasure of this recognition, in *The Pleasure of the Text*. Barthes describes modes of reading, although his *plaisir* and *jouissance* are equally applicable to listening. Rather than visual recognition, the listener grasps references as they pass sonically through time. The listener seeks disruptive bliss (*jouissance*), but also understands the context and cultural logic of the familiar materials (*plaisir*). One cannot enjoy a work of music using borrowed elements without both modes of listening: one that wills destruction (of the integrity of the original work), and one that values and understands the autonomy and coherence of the original. Barthes describes Flaubert's mode of modernist expression, creating texts of *jouissance*, with "a way of cutting, of perforating discourse *without rendering it meaningless*."<sup>22</sup> This double-edged impulse to create and to destroy makes borrowing somewhat alienating to those who do not have the

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<sup>21</sup> Roland Barthes, *The Pleasure of the Text*, trans. Richard Miller (New York: Hill and Wang, 1975), 53.

<sup>22</sup> Barthes, 8.

cultural literacy to understand either the significance of the original materials, or cultural combinatory practices.

Now the subject who *keeps the two texts in his field* and in his hands the reins of pleasure and bliss is an anachronic subject, for he simultaneously and contradictorily participates in the profound hedonism of all culture (which permeates him quietly under cover of an *art de vivre* shared by the old books) and in the destruction of that culture: he enjoys the consistency of his selfhood (that is his pleasure) and seeks its loss (that is his bliss). *He is a subject split twice over*, doubly perverse.<sup>23</sup>

Two texts, and a twice-split subject: Barthes evokes Bakhtin's double-voicedness. The older work is suspended in the background while reading (or hearing) the new one, a split consciousness for a double-voiced work.

Works with borrowed elements "speak" on at least two planes. To reiterate, the work from which the creator borrows—or, the "original" work—persists in the background of the new one, making subsequent omissions, alterations, and consistencies visible.<sup>24</sup> These multiple meanings do not necessarily collide, but instead occupy "different chambers"; borrowed and original elements are combined in new utterances, yet remain irreconcilable due to their visibly different origins.<sup>25</sup> Musical creators "speak" elements of the older work again, but this is always a double-speech, because it speaks the older work *in the context* of the new work and *as* the new work. The old work quite literally takes on a new life and new rhetorical meaning. The borrowed element's new context obscures its previously defined edges, and it transforms into something new. Troublingly, the entanglement of these uses can never be fully teased out. While the new work speaks the

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<sup>23</sup> Barthes, 14. Emphasis added.

<sup>24</sup> See Linda Hutcheon, *A Theory of Parody* (New York: Methuen, 1985), 21.

<sup>25</sup> Mikhail Bakhtin, "Discourse in the Novel," *The Dialogic Imagination*, trans. Caryl Emerson and Michael Holquist (Austin: University of Texas Press, 1981), 295.

older one both “as it was” originally and “as it is” in a newer context, the older work is also changed, especially when the new work becomes ubiquitous, inspiring re-readings of the old through the lens of the new. Listeners must be aware of an “alien discourse” onto which the borrowed work is projected.<sup>26</sup> That is to say, one can only recognize a work is a composite if one also recognizes the borrowed element(s). It is for the sake of this recognition that artists usually choose to borrow from canonic works and conventions, as discussed above.<sup>27</sup>

Near the end of “Discourse in the Novel,” Bakhtin cites the creative potential of “reaccentuation” in language, in which the subsequent author realizes a previously ignored potential already present in the original work (often revealing latent meaning) by the utterance in a new context.<sup>28</sup> He suggests that reuse can give literary figures (or, “novelistic images”) new life, so that they can persist beyond their original cultural contexts.<sup>29</sup> The same is true of musical themes, the migration of which is enabled by recording like never before. “Reaccentuation” functions as a dialogue with the past through a work of music. Musical creators observe something meaningful in the original work, and wishing to speak to it, they place the borrowed element in a dialogue with a new musical context. Drawing on the past, from direct borrowing to mere allusion, may be one of the only ways to *create* in culture so obsessed with “pastness,” so enamored with images of nostalgia, that it seems incapable of creating something independently “new.”<sup>30</sup>

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<sup>26</sup> Bakhtin, “Discourse,” 374.

<sup>27</sup> Hutcheon, 28. Here, I allow for multiple “canons,” classical and popular.

<sup>28</sup> Bakhtin, “Discourse,” 420.

<sup>29</sup> Bakhtin, 422.

<sup>30</sup> See Frederic Jameson, *Postmodernism, or, The Cultural Logic of Late Capitalism* (Durham NC: Duke University Press, 1997), 17.



Bakhtin argues that such a linguistic dialogue has a political ramifications, when “low” forms, like those associated with the carnival and life in public spaces more generally, are placed in dialogue with traditionally lauded “high” forms of “Art”:

Heteroglossia, as organized in these low genres, was not merely heteroglossia vis-à-vis the accepted literary language (in all its various generic expressions), that is, vis-à-vis the linguistic center of the verbal-ideological life of the nation and the epoch, but was a heteroglossia consciously opposed to this literary language. It was parodic, and aimed sharply and polemically against the official languages of its given time. It was heteroglossia that had been dialogized.<sup>31</sup>

As I argue in Chapter 4, the mashup often pits “high” and “low” popular works against each other. It seems the serious, established, “high” works (here, “literary language”) are ridiculed by having to “condescend” to “low” works, yet the result reduces the high and low to the same level.<sup>32</sup> Bakhtin defines language liberally, suggesting it is a system of signification at a very basic level: he argues that even the peasant is a heteroglot, speaking the language of the Church, the “paper language” of official documents, the language of everyday work, the language of folksongs, and others.<sup>33</sup> Thus musical quotation, when placing one tradition into dialogue with another, is not merely a dialogue between pieces, but also a dialogue of musical *languages*, often of musical languages previously accepted as incommensurable. This becomes particularly apparent in the mashup, which productively places different popular musical languages in dialogue. The political potential of this high-low leveling is great, making this form of musical dialogue productive and important. By

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<sup>31</sup> Bakhtin, “Discourse in the Novel,” 273. The political potential of parody and the carnivaleque is also explored in Stallybrass and White’s *The Politics and Poetics of Transgression* (Ithaca NY: Cornell University Press, 1986), see especially Introduction and Chapter 1.

<sup>32</sup> “Knock Out Eileen” discussed in Chapter 4, functions in this way.

<sup>33</sup> Bakhtin, “Discourse in the Novel,” 296.

putting borrowed elements into dialogue with each other (or with new elements), musical creators are able to create biting social and musical critiques.

Parody, too, constitutes a form of dialogue. Linda Hutcheon suggests that it is double-voiced in Bakhtinian terms, a speech with a multiplicity of meanings.<sup>34</sup> She describes parody as “repetition with critical distance,” akin to the repetition of Bakhtin’s “novelistic images Parody itself is often misdefined and conflated with satire, something that Linda Hutcheon seeks to clarify and dispel.<sup>35</sup> While satire has a moral or political agenda for change, parody confronts the past in a multitude of ways: for criticism, mockery, and, strangely enough, to pay tribute. Hutcheon’s elegant “repetition with critical distance” aligns parody with borrowing, as in Renaissance parody mass, rather than reducing it to a form of mockery.<sup>36</sup> This way, the scope of works constituting parody can be expanded, which helps to clarify the relationships between new and critically-repeated material.

The “critical distance” of parody gives musical creators space to offer commentaries on borrowed works. Borrowing is an act, and a purposeful one. That is to say, musical creators mean something by borrowing, and wish to be understood. There are a variety of reasons for a creator to borrow musical materials, none of which are mutually exclusive: (1) to situate his or her new work in the tradition of the borrowed work; (2) to ridicule, satire, *détourner* or criticize; (3) to appeal to the audience with use of familiar materials; (4) to create an avant-garde aesthetic and for sonic experimentation. In the following pages, I

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<sup>34</sup>Hutcheon, 21.

<sup>35</sup> Hutcheon, 16.

<sup>36</sup> Popular in the 16<sup>th</sup> century, the parody mass uses borrowed melodic material as an important structural element. See Hutcheon, 20, 65.

briefly explore each of these reasons, taking examples from both art music and popular music.

(1) Situating a new work in the tradition of the borrowed work. This method of borrowing tends to pay tribute to the borrowed work, and immediately provides a sense of import and gravitas to the new one. Works that borrow with this goal employ signifiers of continuity: creators often borrow material from the same genres or modern generic equivalents; the creators hail from comparable socio-economic classes, and (when present or discernable) they share political visions. In his last movement of his first symphony, Brahms quotes<sup>37</sup> the “Ode to Joy” theme of Beethoven’s Ninth Symphony. Brahms waited until later in life to begin writing symphonies (he finished his First at 43 years old), anecdotally feeling anxiety over Beethoven’s influence, to use Bloom’s turn of phrase.<sup>38</sup> Brahms dealt with this anxiety by acknowledging his place in the same tradition as Beethoven by borrowing the final theme from the previous composer’s final symphony in his own.

Also feeling the influence of a past creator, Kanye West samples Gil Scott-Heron in “Who Will Survive in America” on his album *My Beautiful Dark Twisted Fantasy*. Coincidentally, this sample also falls at the end of West’s work, in a privileged position, at the forefront of the musical texture. West samples a portion of Scott-Heron’s “Comment No. 1,” expressing disenfranchisement and alienation as an African-American man in contemporary America. Scott-Heron’s spoken word pieces, performed over bongo-drum

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<sup>37</sup> One might say that Brahms paraphrases, though the melodic differences are exceedingly minor and superficial. The texture, orchestration, the place in the form (both of the movement and the symphony), and the subsequent repetitions are all consistent with Beethoven’s original.

<sup>38</sup> An oft-cited example of borrowing. See McLeod and Dicola, 45.

ostinatos were important precursors to rap, offering a bridge between beat poetry and hip hop. West samples Scott-Heron's work to pay tribute, to identify the thematic continuities in a black oral poetic tradition, and to align himself with this tradition, as its natural heir.

(2) Borrowing for ridicule, satire, or détournement. Often creators who borrow with these objectives wish to criticize the (failed) seriousness of particularly pretentious canonical works.<sup>39</sup> Such was the case with Debussy's borrowing from Wagner in "Golliwog's Cakewalk."<sup>40</sup> In this short piano work from his *Children's Corner* collection, Debussy borrows Wagner's infamous "Tristan chord" from the opera *Tristan und Isolde*. In its original context in the second bar of the prelude, the "Tristan chord" is harmonic impetus for the notoriously frustrating, barely tonal music of the rest of the opera. Though perhaps less recognizable today than a melody might be, Debussy was careful in his placement of the chord, especially in its voicing (stating the chord tones in the same order, from bottom to top), making the dense and dissonant "Tristan" chord stand out in its new context, a light-hearted, ragtime-inspired piece. Using the tonally ambiguous chord as device for musical colour rather than for any functional harmonic goal, Debussy pokes fun at Wagner's musical and dramatic seriousness. With tongue firmly in cheek, Debussy follows the "Tristan chord" with frivolous, cartoonish, chromatic flourishes, clearly rejecting the way that many listeners would have known the chord was "supposed" to be resolved.

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<sup>39</sup> I mean to echo the "failed seriousness" of Susan Sontag's "camp" here. See Susan Sontag, "Notes on 'Camp,'" in *Camp: Queer Aesthetics and the Performing Subject*, ed. By Fabio Cleto (Edinburgh: Edinburgh University Press, 1999), 59.

<sup>40</sup> McLeod and DiCola also use this example, with slightly different analysis, on page 46.

In popular music, examples in this vein abound. A personal favourite is the delightfully irreverent mashup, “Yakety Sax In Da Club.”<sup>41</sup> This mashup pairs the overly serious rap from “In Da Club” by 50 Cent with Boots Randolph’s frantic, cheesy saxophone-driven “Yakety Sax,” also known as the *Benny Hill* theme song. 50 Cent’s vocals are the object of criticism: his celebration of pursuing girls in the club is reduced to the frantic, missing frame pursuits of Benny Hill, his boasts seeming feeble and ill-grounded. The rapper’s self-aggrandizing seriousness is mocked in perhaps the most effective way: by making him face-off with the silliest of instrumentals, illustrating the failure and absurdity of 50 Cent’s posturing.

(3) Appeals to the audience by use of familiar materials. Surprisingly, this form of unabashed appeal to the audience through recognizable borrowed works is rather common in the art music tradition. From the Middle Ages to the 19<sup>th</sup> century, this practice took many forms, but its humour and appeal remained the same. Mozart appeals to the audience boastfully and playfully in his opera, *Don Giovanni*. During the final act, Don Giovanni enjoys dinner, listening to diegetic music performed by the orchestra. While Giovanni provides commentary on the music, Mozart borrows tunes from popular operas of the time, from Martín y Soler’s *Una Cosa Rara*, Sarti’s *Fra i Due Litiganti* and finally “Non piu Andrai,” from Mozart’s own recent success, *Le Nozze di Figaro*.<sup>42</sup> After this last reference, Giovanni responds “I know that tune far too well,” commenting on the ubiquity of Mozart’s tune, while poking fun at it through Giovanni’s obvious boredom.

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<sup>41</sup> “50 Cent Yakety Sax In Da Club,” YouTube video, 1:46., posted by thereallucky, February 22, 2007.

<sup>42</sup> Julian Rushton, “Don Giovanni,” in *Grove Music Online*.

In popular music, this appeal is often achieved through the use of a sample or interpolation as a hook. Often the borrowed material functioned a hook in its original context as well, making it particularly recognizable in its new context. In a very early example, The Sugarhill Gang uses Chic's "Good Times" as the instrumental of their influential "Rapper's Delight."<sup>43</sup> The beginning of "Good Times" is recognizable, and in the opening of his rap, Wonder Mike memorably states "Now what you hear is not a test, I'm rappin' to the beat," acknowledging the "new" sound that might be confused as a test, and the "beat" over which he is rapping as something separate and pre-existing. In a 2007 interview, Chic's Nile Rodgers recalls hearing "Rapper's Delight" while out at a club, and his group's subsequent lawsuit for co-authorship credits.<sup>44</sup> Many other artists went on to borrow from "Good Times," giving birth to what Judith Peraino calls a "family of songs," united by a family resemblance of shared, borrowed elements.<sup>45</sup>

(4) For avant-garde aesthetics and sonic experimentation. In the early 20<sup>th</sup> century, modernist composers popularized the use of musical borrowing to create avant-garde aesthetics. American composer Charles Ives, in particular, used borrowed elements as integral parts of his works.<sup>46</sup> His "Fourth of July" movement of the *New England Holidays* Symphony (No. 5) uses borrowed elements to create the effect of a parade passing by. The piece is a "cumulative setting of the verse of 'Columbia, the Gem of the Ocean,' though it

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<sup>43</sup> The Sugarhill Gang had studio musicians re-perform the instrumental. Though not sampling, strictly speaking, this was an important precursor to sampling.

<sup>44</sup> "The Story of Rapper's Delight by Nile Rodgers" posted March 2, 2008 by POPBOXTV 4:33.

<sup>45</sup> Judith Peraino, "Monophonic Motets: Sampling, and Grafting in the Middle Ages," *The Musical Quarterly*, 85 no. 4 (Winter 2001): 658-659.

<sup>46</sup> McLeod and DiCola also cite Ives as a borrowing innovator, though they use the example of "Flanders Fields," 46. I have chosen to look at a different piece, one with even more popular and traditional borrowings.

uses a variety of popular and traditional American tunes.<sup>47</sup> Preferring patriotic themes and dance tunes, Ives borrows from “The Battle Hymn of the Republic,” “The Star Spangled Banner,” “Marching Through Georgia,” “Yankee Doodle,” a few hornpipes and some traditional Irish melodies.<sup>48</sup> While the listener’s recognition of these borrowed tunes is important thematically, Ives also uses them to create a collage, making the borrowed familiar materials seem strange in a new post-tonal context.

Examples of musical borrowing for avant-garde aesthetics and sonic experimentation abound in popular music. Much sample-based music can be subsumed under this impulse, though I would like to focus on an innovator in this field, one who made overt statements on the aesthetics of borrowing. John Oswald’s *Plunderphonics* collection is an artistic expression of the musico-political manifesto he presented to the Wired Society Electro-Acoustic conference in Toronto in 1985.<sup>49</sup> A particularly humorous piece is “DAB,” which is comprised entirely of samples from Michael Jackson’s “Bad.”<sup>50</sup> Oswald hones in on likely ignored aspects of the recording, paying special attention to Jackson’s non-melodic vocalizations. Oswald arranges these samples unconventionally; he uses vocal sounds as percussive elements (as in the opening seconds), and processes the iconic beat to glitch unrecognizability. The track ends with the snare drum, processed with a high-pass gate, so that it sounds more like the obsessive ticking of a clock than a drum. Here, the borrowed

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<sup>47</sup> J. Peter Burkholder, *All Made of Tunes* (New Haven: Yale University Press, 1995), 376.

<sup>48</sup> Burkholder, *All Made of Tunes*, 377-379.

<sup>49</sup> The similarly titled “Plunderphonics, or Audio Piracy as a Compositional Prerogative” outlines a composer’s right to draw on music of the past, especially as it is preserved in recorded form, and copyright’s inhibition of the composer’s rights to do so. Accessed at <http://www.plunderphonics.com/xhtmll/xnotes.html>

<sup>50</sup> Note that “Dab” is “Bad” backwards; Oswald lists the track’s artist as “Alien Chasm Jock,” an anagram of “Michael Jackson,” suggesting his play in re-arranging elements in both the title and “artist” of the work.

nature of the parts is crucial to the avant-garde aesthetic, because they signify Oswald's anti-corporate politics.

In all of these examples, the listener can only discern the creator's motivations in the greater context of the work and its function.<sup>51</sup> These categories are by no means mutually exclusive. In most cases, artists are inspired by some combination of these urges. While the specific musical and social contexts of borrowing have changed over time, many of the creative reasons for borrowing have remained the same. Borrowing continues to be a central element of musical creativity. Although it might result in musical objects, borrowing is a practice. Because borrowed elements must be realized in sound, the practice of borrowing consists of speaking and hearing. In this way musical borrowing is oral, because it does not require notation, instead functioning within a musical community. Parody is a specific form of borrowing that uses "repetition" to offer "criticism" by way of the "distance" of time. Musical borrowing creates dialogue both within and without the work. Different musical languages converse within the work, while the work itself functions as an attempt at dialogue with the past within community.

Musical creators use works from the past to construct a musical tradition, to question the assumptions of the originals through criticism, to welcome listeners into the new work with familiar materials, and to challenge the concept of originality itself. In all cases, musical creators borrow purposefully. Listeners find great pleasure in hearing and uncovering these references. All of this exchange happens socially, orally, in musical sound, without the need for notation. Thus copyright, which best accommodates written musical

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<sup>51</sup> Bakhtin, "Discourse," 420.



commodities, has the potential to limit the oral practice that is borrowing, controlling the kinds of statements that musical creators can make.

### **Chapter Overview**

In Chapter 2, I trace how copyright came into conflict with oral practice. I situate the question of musical borrowing in a broader historical narrative, demonstrating that the types of musical borrowing practiced during any historical period depend directly on the proprietary status of musical works. Chapter 3 concerns Medieval musical borrowing and concepts of originality, applying the theoretical concepts of this chapter to case studies from the troubadour and trouvère repertoires. At this time, music functioned as practice rather than as object, circulated orally more frequently than in notation. Music was practiced in communities, and shared within them, with manuscripts supplementing oral practice. Chapter 4 mirrors the second, addressing issues of originality, and musical borrowing in the online communities that exchange mashups. In online mashup communities as well, music functions as an activity. As was the case with close readings from the Middle Ages, mashups do not depend upon music notation. Walter Ong's secondary orality accounts for the circulation of music that borrows from recordings, as does Tricia Rose's application of Ong to hip hop in her work, *Black Noise*. The first part of Chapter 4 concerns the impact sampling lawsuits *Grand Upright Music, Ltd. V. Warner Bros., Campbell v. Acuff-Rose Music*, and *Bridgeport Music v. Dimension Films*. It then turns to originality and transmission, supported by close readings that demonstrate both the many layers of music borrowing at work in the mashup and the kinds of criticisms that artists can make in them. In a short Conclusion, I address the greater legal implications of orality in music, because questions of copyright reform have become inseparable from contemporary

musical borrowing. I make recommendations for copyright reinterpretation and licensing reform to ensure that mashups may continue to circulate.

## Chapter 2: Borrowing and the Proprietary Status of Musical Objects

Before the commodification of music, creators thought of themselves more as practitioners of music than makers of musical objects.<sup>52</sup> Musicians did not rely on the sale of physical music commodities for their livelihoods, supported instead by musical practice in courts, the church, or less lucratively, in public. Oral music practice before copyright was an activity, one that did not depend on notation. After its invention, notation coexisted with oral practice, and they became interdependent. Without tradition, notation was meaningless, but without notation, orally transmitted music was perishable. This chapter examines musical borrowing across a broad history in the Western world. I argue that the quantity and character of musical borrowing depends on the proprietary status of music.

Borrowing was practiced frequently before musical objects were commodified—that is, rendered into printed items for which funds were exchanged. When printed musical commodities entered the market during the Renaissance, borrowing declined as a central activity of music creation. It is true that creators employed borrowing throughout music history, but when physical works of music are considered commodities, creators have greater incentives to compose works that are wholly “original,” that is, that do not seem to borrow. With the development of copyright, ideas of individuality and personhood affected borrowing. Though it was still practiced, borrowing became a purposeful way to gesture towards a tradition, and by doing so to affirm one’s status as the tradition’s “heir” and as an

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<sup>52</sup> “Music” was not even clearly delineated from other aspects of daily life. Jacques Attali discusses the role of music as “background noise” before the commodification of music. He traces the commodification of music along with its divorce from everyday life in *Noise: The Political Economy of Music*, trans. Brian Massumi, (Minneapolis: University of Minnesota Press, 2011).

“author.” Recording enabled the borrowing of exact reproductions of musical sound. It preserved elements that cannot be notated in the score (such as timbre), and appealed to musical creators who wished to borrow. However, copyright did not evolve with recording technology. The same criteria designed to protect scores was used for the protection of recorded music. For this reason, borrowing as oral practice came into conflict with copyright when creators began to borrow recorded elements.

This chapter begins with a theoretical consideration of the physical music commodity, contrasting a theory of “music as thing” with one of music as a practice that results in things. With a working concept of the physical music commodity established, the chapter traces the proprietary status of music in the West beginning with Ancient Greece and the Middle Ages, eventually considering the definitive emergence of the physical music commodity in the Renaissance. I consider musical borrowing alongside the changes in the proprietary status of the physical music commodity, because borrowing as oral music practice is directly affected by the law’s treatment of musical scores and recording. The invention of copyright in 1710 and its unequivocal application to music in 1777 with *Bach v. Longman* did not change the status of physical music commodities in daily life, but it did legitimize the proprietary claims of authors and publishers. Musical objects became property in even stricter terms with the invention of recording, creating the rift between the law and artistic practice discussed later in Chapter 4. The proprietary status of musical objects influences, and sometimes determines, a stylistic period’s use of borrowed musical elements. While the law protects works as “things,” borrowing treats music as a practice that *results* in things, and when these physical music commodities are secondary to practice, musical creators’ ideas are inconsistent with the laws that are meant to protect

their works. Oral music practice consists in speaking and hearing, which are activities and not things. It is in this way that copyright came into conflict with borrowing as a lived, oral music practice.

What is a “physical music commodity”? If music is a sonic phenomenon, then the music cannot be identical with a written score that contains it, that represents it. Medieval historian and theorist Isidore of Seville (c. 560-636) discussed sound and its resistance to notation: “Since sound is a thing of sense it passes along into past time, and it is impressed on the memory...[U]nless sounds are held in the memory they perish, because they cannot be written down.”<sup>53</sup> Though Isidore was discussing sounds more generally, music, understood as organized sound, presents the same challenge of perishability. It is possible to interpret this passage from Isidore of Seville as a confirmation that prescriptive music notation did not exist in the late 6<sup>th</sup> and early 7<sup>th</sup> centuries. But taken less literally, his observations are still relevant to the temporal experience of music. Musical sonic phenomena cannot be “written down,” since a score is only ever a set of instructions for reproduction. Data contained in digital recordings, recently regarded as “writing,” are also only instructions for the production of musical sounds, even though recording can preserve musical elements that scores cannot.<sup>54</sup> Whether or not the music as sound or its representation can be a “thing” is an important to the theorization of a musical commodity. Jonathan Sterne poses the question “is music a thing?” in *MP3: The Meaning of a Format*.<sup>55</sup>

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<sup>53</sup> Isidore of Seville, *Etymologiarum sive originum libri xx*, trans. E. Brehaut (New York: Columbia University, 1912), 136, in Piero Weiss and Richard Taruskin, eds. *Music in the Western World: A History in Documents* (Belmont, CA: Schirmer, 2008), 34.

<sup>54</sup> Like timbre and groove. I return to this point in Chapter 4.

<sup>55</sup> Jonathan Sterne, “Is Music a Thing,” in *MP3: The Meaning of a Format* (Durham: Duke University Press, 2012), 184-226.

He observes that while music is growing less tangible in digital form, the question of music's materiality has long been a problematic one.

Depending on whom you ask, analog and early digital recording media either led us to hold music in our hands or to think that we did. A similar dichotomy exists now. Either music has dematerialized, or its materiality now exists on a different scale... Is music a thing? If it was, is it still? The MP3 format's widespread success demands that we reconsider these basic questions.<sup>56</sup>

After a consideration of the rise of the MP3 format and its consequences in terms of Peer-to-Peer sharing, Sterne invokes Heidegger's discussion of a "thing" as an object that fulfills a purpose that was previously unfulfilled. Thus, "If music is a thing, then it is *for* something, and that affordance is both the substance and the object of critique."<sup>57</sup> According to Sterne, this purpose is "pleasure," making music (as contained in the MP3) a thing for this purpose, and not simply because it can function as a commodity.<sup>58</sup> Earlier in the chapter Sterne compared the views of musicologists that believe in "music-as-practice"<sup>59</sup> with those who prefer "music-as-thing," finally preferring the latter.<sup>60</sup> However, a more Marxian consideration of music as commodity problematizes Sterne's assumption that the "use-value" of music is merely pleasure, and that music is a "thing" more fundamentally than it is

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<sup>56</sup> Sterne, "Is Music a Thing," 186.

<sup>57</sup> Sterne, 193.

<sup>58</sup> Sterne, 221.

<sup>59</sup> Sterne does gloss over "music as practice," largely because his argument requires music to be a thing. Sterne admits that Adorno, and with him other believers in the art music canon, prefer "music as thing," since this privileges the score. Adorno does allow for an idealized concept of the "work" that is not identical with any score, but is still very much a "thing." (see Sterne, 192-193). Proponents of the "new musicology," including Lawrence Kramer and Susan McClary, as well as the field of ethnomusicology, prefer "music as practice," seeking to understand the place of music in the creation of identity, and as acts of individuals rather than through a procession of great "works."

<sup>60</sup> Sterne, 189.

a practice.<sup>61</sup> An oral music culture is a *practice* that may result in “things,” but this is not its primary aim.

To invoke Isidore of Seville once again: in essence, music is more culturally-organized sound, passing through sense perception in time, than it is any physical object (a score, a physical or digital recording). While scores and recordings are things, and most importantly things that result from a practice of music making, these things, or more precisely, musical objects themselves are not identical with the “music” as listeners and performers perceive it. Scores and recordings only approximate and represent music, either in symbolic language, or in a code that, when read, instructs the vibration of a membrane to create musical sound. If there are indeed musical things, these things are secondary to the production of music, the residues of a musical practice. The primacy of process alone does not preclude musical objects from exchange as commodities, since a commodity is, according to Marx, a “residue,” “a mere congelation of homogeneous human labour.”<sup>62</sup> Some variety of human labour, of composition, re-composition, arrangement or performance, results in a musical “thing,” which can be exchanged as a commodity.<sup>63</sup>

Before delving into the history of music’s commodification, a closer reading of physical music as commodity in Marxian terms is required. Music’s role as practice has changed throughout history, and its emergence as “thing” took place quite late in music history. The commercial exchange of musical objects only became possible with the

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<sup>61</sup> Sterne discusses the physicality of digital music as “micromateriality,” since MP3s do occupy physical space on hard drives. See page 194.

<sup>62</sup> Karl Marx, *Capital Volume One: A Critique of Political Economy*, ed. Friedrich Engels, trans. Samuel Moore and Edward Aveling (Mineola, NY: Dover Publications, 2011), 45.

<sup>63</sup> Given the scope of this thesis, I have limited my discussion to the commodification of the musical work. Indeed, musical performances can be commodified and protected by copyright as well, although the proprietary status of musical performances is not directly related to musical borrowing.

invention of print. While this technological innovation was necessary for the commodification of physical music, it alone was not sufficient.<sup>64</sup> In Marxian terms, with the development of music printing, music gained exchange value. Commodities must consist of both a use-value and an exchange value. Items exchanged for one another must be of equal value at the time of exchange.<sup>65</sup> Putting use-value aside momentarily, the work of music<sup>66</sup> in physical form only became a commodity when it was “exchangeable,” that is, housed in physical objects that could themselves be exchanged again if the owner wished to do so. Technological innovations and changes in social relations allowed for the emergence of a physical music commodity; before this, music possessed use-value, though not exchange value. According to Marx, “[a] thing can be a use-value without having value.<sup>67</sup> This is the case whenever its utility to man is *not due to labour*. Such are air, virgin soil, natural meadows, &c.”<sup>68</sup> If we re-interpret this statement with regards to music the use-value of music is not *determined* by labour in that, as Attali suggests, the amount of labour is not analogous to the cultural value of music, since “each object is unique, and the mold is only used once.”<sup>69</sup> Musical practice exists beyond the objects that contain and preserve it, making these physical objects meaningful “residues” of music culture, but by no means necessary to the music culture. Manuscripts constitute early “residues,” but they were

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<sup>64</sup> Changes in conceptions of personhood and ownership also contributed to the emergence of a musical commodity.

<sup>65</sup> Marx, 43. In *Capital* at this point, Marx has not theorized the concept of money, so he reduces exchange to its most fundamental elements. Eventually the exchange will consist of funds for goods, but this exchange too considers the exchanged objects equal.

<sup>66</sup> Before the commodification of the work, performances could be compensated, and thus exchanged for other goods or services like payment, or room and board.

<sup>67</sup> Marx’s wording may seem strange here: by the criteria he sets forth, something must have both use *and* exchange value to have *value*, thus anything lacking exchange value also lacks value, though it may be useful.

<sup>68</sup> Marx, 47.

<sup>69</sup> Jacques Attali, *Noise: The Political Economy of Music*, trans. Brian Massumi, (Minneapolis: University of Minnesota Press, 2011), 40.



secondary to oral practice. As will be discussed in more detail in the following chapter, musical borrowing flourishes when music is primarily an oral practice, and can become limited for a variety of reasons (societal and economic) with the emergence of a print music commodity.

In review: music becomes a commodity when individuals willingly exchange something of their own (usually money, which is a simulacrum for accumulated labour), for a physical music commodity. This music commodity<sup>70</sup> contains a representation of sound to be realized either by the purchaser and/or other players of music, or by a piece of technology that reads the object and produces the music. Indeed, the “record object is not useable by itself.”<sup>71</sup> The earliest instances of the exchange of printed musical objects in Western culture take place during the Renaissance. Though the consumers and means of production change, the terms of this exchange remain basically unchanged until the online circulation of the MP3.<sup>72</sup> Having established a working definition of the physical music commodity, and that this commodity differs from other musical objects because it is exchanged, it is possible to consider the historical creation of the physical music commodity. Ancient Greece was the first culture that developed music notation that had continuing influence on Western music, so it is here that I choose to begin my historical genealogy of the physical music commodity.<sup>73</sup>

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<sup>70</sup> For the purposes of this project, I will limit my discussion to musical objects like scores and recordings, though performances too were commodified, and are also protected by copyright.

<sup>71</sup> Attali, 96.

<sup>72</sup> As described in Sterne, 198.

<sup>73</sup> I must limit my discussion to the proprietary status of music. Thus, I have cited specialists of both copyright and music history. The scope of this thesis does not allow for an in-depth consideration of each historical period. Instead, this section of Chapter 2 is intended to reveal that music was not always treated as a commodity. Though a concept of authorship may exist, ownership is a different matter.

Music was intensely valued in Ancient Greek culture, and permeated all spheres of life, from public performances in classical dramas to intense theoretical consideration in the philosophical treatises of Pythagoras, Plato, and Aristotle. Music education was a concern of the state, and a working knowledge of music theory was considered necessary for each rational citizen. Ancient Greece developed its own system of music notation, one that can still be read today. While there are few surviving pieces of Greek music, it is clear from treatises and other documentary evidence that music was frequently notated. In addition, much of the poetry with which music was performed survived.<sup>74</sup> Unsurprisingly, Ancient Greek poetry displays the high degree of intertextuality that often accompanies an oral tradition. In the epic, standard formulae recur in different works (depending on metrical positions), and references to other works are common.<sup>75</sup> However, while Ancient Greece seemed to possess the conditions for the commodification of music (i.e. a legal system that included property rights, a system of notation, and a musically-literate upper class), “music remained part of an *oral* tradition and was not commodified.”<sup>76</sup> Ancient Greek thinkers were very self-reflexive on the subject of music creation and dissemination, yet they did not make proprietary claims about music, as it remained intangible and transient, part of a perishable oral tradition and a shared culture.

Since no pieces of Ancient Roman music survive, it is unclear whether Rome developed its own system of notation, or imitated the Ancient Greek model as they were

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<sup>74</sup> Since music and poetry were undifferentiated in Greek music (with instrumental music of such a low status that Plato and Aristotle barely mention it, and grudgingly), this can be a helpful diagnostic of borrowing in music.

<sup>75</sup> As discussed in Chapter 1. See Leo Treitler, “Homer and Gregory: The Transmission of Epic Poetry and Plainchant,” *The Musical Quarterly*, 60 No. 3 (July, 1974), 333-372. See also Walter Ong (on Parry and Lord), *Orality and Literacy* (New York: Methuen, 1982), 21.

<sup>76</sup> Carroll, “Whose Music is it Anyway?,” 1419. Emphasis added.

went to do in literature and sculpture. For the purposes of this chapter, the next literate music cultures with extant repertoires emerged in the Middle Ages. After the fall of the Roman empire and the subsequent division of its former territories into East and West Christendom, much Ancient Greek philosophy was lost, and along with it, the first system of music notation. Thus notation was reinvented, first as a system derived from linguistic stress symbols above a text in the 7<sup>th</sup> century; eventually the symbols' elevation on the page was used to signify pitch; finally, music educator and theorist Guido of Arezzo invented the four-line staff in the late 1020s to early 1030s.<sup>77</sup> He originally created the staff as a pedagogical device, though his system clearly had even greater consequences for the preservation of music. Even after the invention of the staff, manuscripts were used primarily to enhance a functionally oral music practice. Libraries associated with monasteries and cathedrals could retain older repertoires of music: it is through these libraries that many Medieval sources survived.<sup>78</sup> With the rise of cities and birth of the university, the conditions for the commodification of musical objects seemed to be present. However, Medieval creators did not make proprietary claims<sup>79</sup> about their works, because music was still primarily an oral practice.<sup>80</sup> To use Marx's terms, music fulfilled a variety of

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<sup>77</sup> See Richard J. Hoppin, *Medieval Music* (New York: Norton, 1978), 60, on the invention of the four line staff.

<sup>78</sup> Although they did not always: the total number of surviving Medieval manuscripts is actually quite small considering how many must have been used.

<sup>79</sup> Although Medieval creators may have considered themselves "authors" in some regard, they did not think of themselves as "owners" of their works. The relationship between the author and the work was not economic, but causal: the author brought the work into existence. Composers including Guillaume de Machaut, Adam de la Halle, and Notker Balbulus did assert authorial control in a variety of ways, but they did not claim ownership of their works in the way that later composers did. This distinction is important, though subtle.

<sup>80</sup> However, in the late 6<sup>th</sup> century, Saint Columba created a secret copy of a book belonging to Saint Finnian, who was protective of the volume and its contents. Finnian demanded Columba return the copy, although his own version was uncompromised by Columba's. The Celtic King Diarmait mediated the conflict, stating "to every cow her calf; to every book its copy," and Columba was forced to return the copy. See Geller, and Masterson, in Carroll, "Whose Music," 1435, note 122.

“useful” functions in both sacred and secular life, though it was not exchanged in the form of musical objects. As Jacques Attali writes, “The circulation of music was neither elitist nor monopolistic of creativity. The feudal world, with its polyphony, remained a world of circulation in which music in daily life was inseparable from lived time, in which it was active and not something to be watched.”<sup>81</sup> In the feudal world, music remained a practice, not an art contained in objects. Some musical objects were “circulated” but never exchanged *for* something else, thus not commodities.

Since music remained an oral practice in the Middle Ages, it consisted of hearing and speaking: that is to say, it depended on performance.<sup>82</sup> Musicians did not rely on the exchange of musical objects for their livelihoods, instead seeking work as singer-songwriters or instrumentalists. Thus job security—securing the employment in the performance of musical practice—was of utmost concern to Medieval musicians. Abram Loft, in a 1950 dissertation, wrote,

The musician’s place in the social scale in ancient times<sup>83</sup> was somewhat precarious. While his activity was vital to the smooth and pleasant functioning of all levels of society, he could at any time be attacked by certain groups of that society on moral grounds.<sup>84</sup>

Reputation was important to the Medieval musician, since his employment depended upon it. Guiraut Riquier, a 13<sup>th</sup>-century troubadour, was concerned that his accompanying musicians were described as “jongleurs,” which he associated with a lower status. He

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<sup>81</sup> Attali, 15.

<sup>82</sup> It is beyond the scope of this thesis to fully examine the influence of music copyright on performance. However, when musical objects are secondary, performance is required in the transmission of the work. It is in this regard that I approach the issue of performance, and not as an independent practice that comes to garner its own protection from copyright.

<sup>83</sup> Loft includes the Middle Ages in this term.

<sup>84</sup> Abram Loft, “Musicians’ Guild and Union” (PhD. dissertation, Columbia University, 1950), 10.

petitioned King Alfonso X to ensure that his instrumentalists were given another title.<sup>85</sup>

Practice superseded objects in the musician's mind, since he depended on steady employment, and not on the sale of goods, for his income.

The autonomy of the work was not relevant in this culture of musical practice, since the work was not conceived of as closed or finished. For these reasons, musical borrowing in the Middle Ages was ubiquitous, used in troubadour and trouvère songs, and sacred polyphony of the Catholic liturgy. Secular genres like the *motet enté* and the *chanson avec des refrains* used borrowed *refrains* from familiar, preexisting songs. These *chansons* appealed to noble audiences because of their courtly subject matter (great deeds, unattainable ladies, political allegories), and in their occasionally esoteric allusions. Sacred music, too, used borrowed musical materials, usually chant, as a foundation on which to build. Chant was used as the musical basis for new compositions, including organum and motets; these polyphonic compositions embellished, extended, and nearly rendered these re-used melodies unrecognizable at times.<sup>86</sup> *Contrafactum*—or the addition of newly-written words to old music—was practiced in both the sacred and secular spheres, enabling works to move from one to the other.<sup>87</sup> According to Boogart, Medieval thinkers considered the relationship between old and new materials in the *motet enté* (or “grafted motet”) in a very different way from 21<sup>st</sup>-century listeners. It is tempting to understand borrowed materials as “grafted” onto the new composition. Instead, Boogart “use[s] the

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<sup>85</sup> See Loft, 36-37.

<sup>86</sup> The 13<sup>th</sup>-century motet, which employed borrowed elements in the tenor line, seems to rely on visual as well as sonic recognition. I hope to pursue the potentially visual (notated) character of borrowing in the motet in future research.

<sup>87</sup> Sacred text was given to popular tunes, and vice versa: this was an important (though unofficial) mode of preservation of secular Medieval music. Carroll remarks on this technique as well on 1435 of “Whose Music.” Interestingly, he includes that this technique was also called “parody” at this time, something that becomes important in the Renaissance, and again in the present day as deployed in online music remix culture.

term ‘grafting’ not, as is usually done, in the sense of pasting an existing refrain onto a new text but rather in its original sense: the new work is ‘grafted’ on older material.”<sup>88</sup> Johannes de Grocheio, an early 14<sup>th</sup>-century music theorist used the metaphor of a new, fruit-bearing branch “grafted” onto an established tree to describe the grafting of the *motet enté*.

Borrowed music was already firmly established and bearing fruit: grafting merely complimented a living musical tradition. *Motets enté* were preserved in notation, but practitioners conceived of them as musical acts situated in tradition rather than as objects.

The invention of the printing press in 1440 created print commodities in literature, and created the “work,” the “author,” and “borrowing,” where before there had been only craftspeople and the essentially perishable results of their labour. Printing technology was adapted to music, extending these concepts to music authorship as well. Indeed, “The artist was born, at the same time as his work went on sale.”<sup>89</sup> It was only possible to speak of “works on sale” because music could be represented (though this was possible since the 11<sup>th</sup> century), and consumers were able and willing to exchange something of their own for these commodities:

Representation emerged with capitalism, in opposition to the feudal world. It directed all new surplus-value toward the entertainment entrepreneur and the music publisher—few musicians made fortunes, and the royal courts lost their power. However, it was practically impossible to increase productivity. As the economy as a whole developed, the profit rate necessarily fell in this sector, due to an economy-wide basis, and in the remuneration of authors of music.<sup>90</sup>

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<sup>88</sup> Jacques Boogart, “Encompassing Past and Present: Quotations and their Function in Machaut’s Motets,” *Early Music History* 20 (2001): footnote 6, pg. 2. See also, Judith Peraino, “Monophonic Motets: Sampling, and Grafting in the Middle Ages,” *The Musical Quarterly*, 85 no. 4 (Winter 2001): 644-680 for more on Medieval conceptions of “grafting” and the use of horticultural metaphors.

<sup>89</sup> Attali, 47.

<sup>90</sup> Attali, 41.

Increased literacy rates and an emerging merchant-middle class created the opportunity for leisure time, and with it the demand for recreational commodities. Home-music making flourished; skilled amateur musicians judged musical proficiency as a signifier of refinement. Though most composers continued to rely on some form of patronage until the 19<sup>th</sup> century (with the rise of the bourgeoisie), it is at this time that the court and the church were joined by the public as primary spaces for musical labour.

With the decline of Medieval courts,<sup>91</sup> musicians turned increasingly to the public for employment. Many found work as town musicians, and organized themselves into guilds for greater job protection and to resist the threat of the travelling musician who may have taken local jobs.<sup>92</sup> In this turn to the public, musicians also used publishing to contribute to their varied incomes: musicians still fulfilled a variety of roles, as educators, performers, instrument-builders, and authors. The sale of printed music commodities becomes a viable supplement to a musician's income. Notation and print created an affordable, physical music object that could be exchanged, making it a commodity. Changes in technology, associated shifts in social organization and an emerging sense of personhood (fully realized in the Enlightenment) contributed to the creation of the "author," or here, "composer," and the conditions were ripe for a physical music commodity to enter the market.

Music printing emerged shortly after standard text printing, since it required some unique technical modifications. Just as the first book printed by Gutenberg was the Bible,

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<sup>91</sup> Some courts survived into the Renaissance, but there were fewer, and the economy shifted from feudalism (which held the court at the top of a chain of interdependency), to capitalism, which functions by the exchange of commodities.

<sup>92</sup> See Loft, 42-44. The first guilds were established in Germany, with the *stadtpfeifer* (or town-piper) the first group of musicians to create one in the late 1400s.

Italian publisher Ottaviano Petrucci began printing the chant repertoire in 1473. By 1501, he “began to significantly publish works other than plainsong,” and had become the major force of music publishing in Italy and across Europe.<sup>93</sup> Petrucci’s publishing technique featured three impressions: one for notes, one for staves, and one for text and musical symbols.<sup>94</sup> By 1528, Parisian publisher Pierre Attaignant popularized a single impression printing technique that made sheet music printing faster, cheaper, and thus more accessible to the public. Attaignant himself used this system into the 1550s, and it remained “little altered for more than 200 years.”<sup>95</sup> Technology finally provided the means to reproduce musical notation quickly and cheaply, and the new class of amateur musicians created provided a market for music commodities. While music remained a practice, and still does, more and more people began to access music through printed music commodities, and not just through performances. Printing became lucrative, and governments began to regulate music publishing. The most direct precursors of music copyright appeared: publishers were required to obtain royal privileges for publishing rights.<sup>96</sup>

As with many legal rights, the ramifications of these royal privileges are best observed when they are violated. Instances of what Carroll calls “unauthorized publication”<sup>97</sup> occurred almost as soon as publishing began, with disputes addressed in

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<sup>93</sup> Resse, and Fenlon, in Carroll, “Whose Music,” 1456.

<sup>94</sup> Stanley Boorman, “Printing and Publishing of Music, § I: Printing, ‘Printing from Type, ii: Early History,’ “ in *Grove Music Online*, accessed Tuesday January 8, 2013.

<sup>95</sup> Boorman, “Printing and Publishing of Music.”

<sup>96</sup> Carroll, “Whose Music,” 1458.

<sup>97</sup> Carroll, “Whose Music,” 1467. He chooses this term in contrast to “piracy,” which he considers to be anachronistic.



court.<sup>98</sup> Most disputes regarded who had the rights to print what literature, and who had the right to benefit financially—both of which constitute questions of exchange. Before copyright, the conditions for the exchange of musical objects were still poorly regulated, which made publishing cutthroat and competitive. Early music publishers did not have access to vast back-catalogues of booksellers, and were quick to publish new compositions. Renaissance music theorist Johannes Tinctoris (1436-1511) himself admitted “that there is no composition written over 40 years ago which is thought by the learned to be worthy of performance.”<sup>99</sup> Some demand for the chant repertoire remained, but there was little demand for Medieval music overall. Consumers preferred music with the new Renaissance sonorities, characterized by triads and vertical harmony, not the parallel fifths and horizontal counterpoint of the Middle Ages. Thus Renaissance sonorities changed the character of musical borrowing. Because of this emphasis on originality and the rejection of music of the recent past, borrowing was practiced with different objectives in the Renaissance. It was no longer an integral part of composition and more of a purposeful technique used for specific creative objectives. When composing cantus firmus mass settings, composers included the source in the title, delineating what was new and what was borrowed.<sup>100</sup> The potential rewards of publishing and the skilled amateur market’s appetite for novelty created a distinct preference for works that were newly composed, such as the madrigal, which set recently composed vernacular poetry to polyphonic music for vocal ensemble. Also popular but lower in cultural stature, quodlibet was a

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<sup>98</sup> Carroll, “Whose Music, 1467.

<sup>99</sup> Johannes Tinctoris, *Liber de arte contrapuncti* [1477] trans. Albert Seay (Rome: American Institute of Musicology, 1961), 14-15, in Weiss and Taruskin, 68.

<sup>100</sup> Take, for instance, Dufay’s Missa “Se la face ay pale,” or the numerous masses on the L’Homme Armé. Masses and motets, both featuring borrowed materials did circulate extensively in print. In future research, I hope to explore the changes to musical borrowing in the Renaissance in these sacred repertoires.

compositional technique that combined many popular tunes, either successively or polyphonically, “usually with humourous intent.”<sup>101</sup> Instrumental music, the last tradition to benefit from preservation and dissemination through publishing, also developed its own quotation-based genre in the set of variations.<sup>102</sup> Though variation is not necessarily borrowing, early variations indeed take pre-existing material as the basis of new compositions:

Borrowing and variation are clearly related; most types of borrowing in the Renaissance, from paraphrased hymns and instrumental intabulations to the imitation mass, resemble one or more free variations on the source, and embellishing a newly composed theme is similar to reworking an existing piece. But pieces conceived as sets of variations first appear in the 16<sup>th</sup> century, especially in Italy, Spain and England, in works for lute, vihuela, or keyboard.<sup>103</sup>

Copyright solidified a concept of intellectual property, and gave not only an incentive to create but also a disincentive to borrow, at least in certain ways.

As publishing became more lucrative, governments sought to regulate it, at first to censor literature, and later to give authors first priority to publish their own works. These royal privileges, royal patents, and letter patents were the direct precursors to copyright.<sup>104</sup> Though most European countries regulated publishing, it is the English letter patent that is most relevant to the present discussion, because copyright was ultimately created in England. In the 1550s, the Crown granted the Company of Stationers all responsibility for publishing grants, which stayed in effect for over a century. However, after Parliament allowed the 1662 Printing Act to lapse in 1694, the law no longer

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<sup>101</sup> Burkholder, “Borrowing: Renaissance Secular Music” in *Grove Music Online*, accessed January 8, 2013.

<sup>102</sup> The variation is an instrumental genre that uses a given tune as the basis for repetition and systematic elaboration. Examples include Bach’s *Goldberg Variations*, Beethoven’s *Diabelli Variations*, and Renaissance composers William Byrd’s variations on *John come kiss me now*, and John Bull’s *Salvator Mundi*.

<sup>103</sup> Burkholder, “Borrowing: Renaissance Secular Music.”

<sup>104</sup> Michael Carroll, “The Struggle for Music Copyright,” in *The Florida Law Review*, Vol. 57, 2005, 921.

regulated publishing. However, the Stationer's Company lobbied for new regulation for their own benefit, and the Statute of Anne of 1710, the first copyright act, was created.<sup>105</sup> The Statute of Anne applied specifically to "books" and "writings," which did not necessarily include printed music, though it did not expressly exclude it either.<sup>106</sup>

The Statute of Anne was created for the "Encouragement of Learned Men to Compose and Write useful Books" by protecting authors from unauthorized publications of their works.<sup>107</sup> Creation was the primary objective of this Act, with the fair compensation of creators working towards this end. In order to ensure that "Learned Men" continued to create new works, the Statute of Anne limited the copyright term to for fourteen years, with a second term of fourteen years for the original author.<sup>108</sup> Authors could opt to transfer their rights to publishers for the first term, but the second term transferred to the author or heirs, much to the Stationers' chagrin.<sup>109</sup> They would continue to lobby for perpetual copyright so they could benefit from canonical works, attempting to eliminate the "newly created statutory public domain."<sup>110</sup> The Statute regulated printing: the production of physical commodities. Its purview regarding music remained unclear, but in literature, the Statute concerned the creation of physical objects, albeit ones that consisted of what is now known as "intellectual property."

Composers did not immediately make use of the Act, continuing to rely more on the profits of public performances of their works, the employment of patrons, and work as

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<sup>105</sup> Indeed, this was not the Stationers' desired form of regulation. See Carroll, "The Struggle," 923-924.

<sup>106</sup> Carroll, "The Struggle," 923.

<sup>107</sup> *Statute of Anne* (c. 19), facsimile accessed at <http://www.copyrighthistory.com/anne.html>

<sup>108</sup> *Statute of Anne*, and Carroll, "Struggle," 924.

<sup>109</sup> See Carroll, "Struggle," 924.

<sup>110</sup> Carroll, "Struggle," 924, referencing Mark Rose, 52.

performers.<sup>111</sup> For the composer, publishing still supplemented performance, and was used to promote performance rather than vice versa.<sup>112</sup> Since the Statute of Anne did not explicitly protect printed music as “books,” music publishing was a cruel and competitive business, with publishers rushing to publish anything popular, while the authors—frequently in the employ of patrons—received nothing. When enterprising composer John Gay, best known for his satirical work *The Beggar’s Opera* (1728), sought to mount a production of a sequel, the government censored his work.<sup>113</sup> In response, Gay decided to publish the opera, registering it with the Stationers himself, and he successfully invoked his rights to suppress four unauthorized editions of this work.<sup>114</sup> *Donaldson v. Beckett* confronted the issue of perpetual copyright and the creation of a public domain. The court ultimately ruled that copyright was a statutory matter, and had no basis in common law.<sup>115</sup> However, it was *Bach v. Longman* (1777) that definitively affirmed composer’s copyright, and makes later proprietary claims about printed music possible.

Johann Christian Bach, known as “The English Bach,” and youngest son of Johann Sebastian Bach,<sup>116</sup> moved to England and mounted a series of successful public

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<sup>111</sup> Into the 18<sup>th</sup> century, musical labour had not yet been divided into the later categories of composer, performer, educator, and theorist, with most professional musicians performing more than one (and in the case of Bach, all) of these duties. Jacques Attali’s *Noise* traces the evolution of these divisions alongside a history of aesthetics. See *Noise: The Political Economy of Music*, trans. Brian Massumi, (Minneapolis: University of Minnesota Press, 2011).

<sup>112</sup> See Chanan, in Carroll, “Struggle,” 927.

<sup>113</sup> Carroll, “Struggle,” 935, cites James R. Sutherland “Polly Among the Pirates,” on this matter.

<sup>114</sup> Carroll, “Struggle,” 936.

<sup>115</sup> The case for perpetual copyright seems to forget the limited term demanded by this first Act. Carroll mentions *Donaldson* briefly on page 925 of “The Struggle for Music Copyright.”

<sup>116</sup> Clearly much had changed from the time that J.S. Bach and J.C. Bach were composing. The younger Bach lived in England at the beginning of the industrial revolution, while his father had dwelled in Leipzig for much of his compositional career. J.C. Bach had the opportunity to sell his works to a skilled amateur market of the bourgeoisie in cosmopolitan 18<sup>th</sup>-century London. J.C. Bach had significant financial troubles stemming from the burden of his case against Longman and Lukey, and the embezzlement of funds by a servant. For these reasons, he was more invested in compensation for his musical works than his father.

performances of his works, for which he had acquired a royal privilege to print.<sup>117</sup>

Publisher Longman & Lukey began to publish these works without permission; Bach and his lawyer sought to overturn the *Donaldson* decision, hoping to use common law justifications for their complaint. They also wished to “clarif[y] that musical compositions were within the scope of the Statute of Anne.”<sup>118</sup> The court ultimately decided, “a musical composition is a *writing* within the Statute of the 8<sup>th</sup> of Queen Anne,” finally “resolving,” as Carroll puts it, “sixty-seven years of doubt on this issue.”<sup>119</sup> In this early decision, music was defined by its physical representation. In the 20<sup>th</sup> century copyright cases discussed in Chapter 4, music is similarly regarded as object. Publishers eventually warmed to this ruling, seeing its profitable potential.<sup>120</sup>

Music had been circulating as a printed commodity for centuries before *Bach v. Longman*, but this decision finally confirmed that music was within copyright’s scope, justifying composers’ and publishers’ proprietary claims about music. This 1777 case took place during the Enlightenment, which valued the rational, creative endeavors of the individual. Indeed, “the individual” is very much a product of this time, emerging alongside the author. Foucault writes:

[I]t was at the moment when a system of ownership and strict copyright rules were established (toward the end of the eighteenth and the beginning of the nineteenth century) that the transgressive properties always intrinsic to the act of writing became the forceful imperative of literature. It is as if the author, at the moment he was accepted into the social order of property which governs our culture, was compensating for his new status by reviving the older bipolar field of discourse in a

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<sup>117</sup> See Carroll, “Struggle,” 942-943.

<sup>118</sup> Carroll, “Struggle,” 944.

<sup>119</sup> Emphasis added. See Carroll, “Struggle,” 945, especially note 241. J.C. Bach unfortunately “did not realize a positive return” on this ruling, dying a debtor, largely because of the cost of his lawsuit; “creditors attempted unsuccessfully to seize his body for sale to medical schools.”

<sup>120</sup> Carroll, “Struggle,” 946.

systematic practice of transgression and by restoring the danger of writing which, on another side, had been conferred the benefits of property.<sup>121</sup>

For Foucault, authorship relates to personhood as it springs from accountability: both for the sake of compensation and the risk of punishment. The newly created discursive entity of the individual bears both the risks and rewards of creativity, becoming the “author” in doing so. Thus the author emerges in part through technological innovations and new legal protections, but also through changing notions of personhood, accountability, and originality.

With the author emerged the statutory public domain.<sup>122</sup> Copyright not only protects newly created works, but it also gives older works (ripe for reuse) back to this communal domain. Before copyright (and its application to music), works entered a “public domain” by default; that is to say, works were immediately available for all to use. This state of affairs had both benefits and disadvantages for creators: they could draw upon works for inspiration and quotation (even works that were created quite recently), but their own works could be reproduced without authorization. Authors did not benefit greatly from printing agreements, with publishers reaping most of the financial rewards.<sup>123</sup> Artists were disadvantaged in this transaction: they lost access to works that were previously communal by default, and did not gain much in return. The creation of a “public domain” as something opposed to copyright depicts an ideological change regarding intellectual property ownership. Considering the public domain in this way, it is easy to

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<sup>121</sup> Michel Foucault, “What is an Author?” in *Michel Foucault: Language, Counter-Memory, Practice: Selected Essays and Interviews*, ed. Donald F. Bouchard, trans. Donald F. Bouchard and Sherry Simon (Ithaca: Cornell University Press, 1977), 124-125.

<sup>122</sup> See Carroll, “Struggle,” 924, referencing Mark Rose, 52.

<sup>123</sup> Arguably this imbalance remains—copyright owners of both works and recordings continue to benefit more than artists because contracts require the transfer of the artist’s copyright to the publisher.

forget that copyright is a purely statutory matter (as decided in *Donaldson*), and thus does not have a basis in common law. It was created to protect authors from unauthorized publishing and to thus promote creativity, with these functions soon coming into conflict with lived artistic practices.

Because of these legal and ideological changes and changes in music theory,<sup>124</sup> borrowing occurred less frequently in the Enlightenment. Borrowing remained a selective way of signifying, of gesturing towards a musical past, as in the Renaissance.<sup>125</sup> Though some composers still borrowed from Medieval chant in the Renaissance, by the Baroque era this repertoire was seldom used, “partly because the modern style differed radically from the old modal tunes and from earlier styles of elaborating them.”<sup>126</sup> With the unequivocal establishment of the major and minor tonalities in the High Baroque, these “modal tunes” did not suit the new sonic universe, and were largely abandoned. Bach, however, frequently borrowed from the slightly newer repertoire of Lutheran chorales, as in the opening chorus of *St. Matthew Passion*. Variations remained popular in the Baroque, though the borrowed material became “less a line to be decorated than...a general framework.”<sup>127</sup> Quodlibet and medley were occasionally employed in “art music” contexts, as diegetic music in opera, or as part of the narrative of a programmatic work.<sup>128</sup> It is interesting to note that in the early years of music copyright, creators of “popular” music seldom asserted exclusive rights in their works. Perhaps, as Attali suggests, this is because

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<sup>124</sup> Baroque style established the major and minor modes, eschewing the few, last modal sonorities that persisted in the Renaissance.

<sup>125</sup> As in Reason 1 for borrowing from the previous chapter: using pre-existing materials to make reference to a past work for a knowing audience.

<sup>126</sup> Burkholder, “Borrowing: The Baroque Era,” accessed January 10.

<sup>127</sup> Burkholder, “Borrowing: The Baroque Era.”

<sup>128</sup> i.e. music that expresses extra-musical ideas, often taking the form of a narrative. See Burkholder, “Borrowing: late 18<sup>th</sup> Century” in Grove, accessed Friday, January 11.

“the popular” was not valued for exchange until the birth of the star performer.<sup>129</sup> Because Enlightenment thinkers valued original statements of artistic genius above collective productions of an artistic tradition, borrowing was practiced less and less frequently.

The 19<sup>th</sup>-century saw a surge in musical borrowing, and paradoxically affirmed the “author” as a cultural fixture, and further enshrined the concept of originality. Burkholder writes:

Borrowing was fully accepted for genres in which it was traditional, from variations to potpourris, and for conveying through music the flavour of a national or ethnic group, exotic culture or past era by borrowing music that was essentially foreign to the current musical idiom. These had in common the understanding that the composer was placing existing music in a new and very different context. But emulation of earlier works of the same genre, the lifeblood of musical tradition, became problematic, although still used in the training of composers.<sup>130</sup>

Even more emphasis was placed on the use of musical borrowing to tie the new creator to the tradition of the borrowed work. Symphonic writing especially employed borrowing in this way, as composers attempted to situate themselves in a lineage as descendants of Beethoven.<sup>131</sup> In its obsession with Gothic revival, the 19<sup>th</sup> century saw a resurgence of borrowing from chant. In fact, Burkholder cites the Dies Irae chant (from the Mass for the Dead) as one of the most borrowed melodies of this century.<sup>132</sup> Piano or chamber arrangements of pieces for larger performing forces (orchestral or operatic) often became newly-imagined compositions based on borrowed themes; Liszt’s *Réminiscences de Don Juan* (a piano work inspired by Mozart’s *Don Giovanni*) reorders the original melodies, and

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<sup>129</sup> Attali, 72.

<sup>130</sup> Burkholder, “Borrowing: 19<sup>th</sup> Century,” accessed March 20, 2013.

<sup>131</sup> See previous Chapter 1 on Brahms’s borrowing of Beethoven.

<sup>132</sup> As in Berlioz’s *Symphonie Fantastique*, among many others. See Burkholder, “Borrowing: 19<sup>th</sup> Century” in *Grove Music Online*, accessed January 12, 2013.



includes a newly composed, triumphant finale.<sup>133</sup> Popular genres featuring the recombination of recognizable tunes persisted in the 19<sup>th</sup> century. Works with borrowed elements balanced the demand for authorial originality and sincerity with musical borrowings that purposefully tied the composer to a tradition. Musical borrowing co-existed with the Romantic “cult of the author” because it could be deployed as an expressive, symbolic tool. However, when it became possible for musicians to preserve sound in a physical medium, issues of originality and infringement arose.

There were few significant changes to copyright in the second half of the 19<sup>th</sup> century before the invention of recording. The copyright term was extended (to 28 years with an option of a 14-year renewal), and music was finally addressed specifically in European and North American statutes, no longer an implied “book” as in the Statute of Anne.<sup>134</sup> The popularity of coffee houses and cabarets also necessitated the addition of legislation on public performance rights, which the author held by default.<sup>135</sup> Composers frequently sold sheet music at public performances in cabarets and cafés: under these circumstances, the composer only received “royalties” when he was present.<sup>136</sup> Publishing flourished like never before, aided by the affordable manufacturing of the piano for nearly any income. The novelty of the player piano provoked the creation of “mechanical reproduction rights” in the Copyright Act of 1909: “once a copyrighted musical composition had been released to the public, any other recording artist could record his

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<sup>133</sup> A. Riethmüller, “Franz Liszt’s “Réminiscences de Don Juan,” in Burkholder, “Borrowing: 19<sup>th</sup> century” accessed January 12, 2013.

<sup>134</sup> Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity*, (Athens: University of Georgia Press, 2006), 19.

<sup>135</sup> Demers, 19. This development (along with performers’ performance rights) eventually leads to the possibility of conflicting rights in music copyright.

<sup>136</sup> Attali, 75.

own version of the piece as long as he paid a licensing fee.”<sup>137</sup> In cases as little as a decade previously,<sup>138</sup> piano rolls were considered to be beyond the scope of copyright, and thus not identical with scores. Since print still reigned as the dominant physical music commodity, it is not surprising that recorded music would be treated in much the same way as its predecessor.

First invented in the late 19<sup>th</sup> century and applied to music in the early 20<sup>th</sup>, recording changed both the place of music in the home, and the market for music commodities. Used for clerical work and later applied to music, recording was used to literally “record” the historical moment of a performance, but according to Attali, recording eventually “shatter[s] representation” as it previously functioned in the score.<sup>139</sup> Along with the advent of radio, music consumption shifted from a primarily active practice, based around the consumption of scores and home performance, to a passive one, consisting mostly of listening to either radios or phonographs.<sup>140</sup> However, this shift in consumption and technological format was not sufficiently accommodated in new legislation. The American Copyright Act of 1909 does incorporate the new medium of recording, but it does so by subjecting it to exactly the same standards as materials previously printed. In addition to the right to public performance, a composer also had the right “to make any arrangement or setting of [the work] or of the melody of it in any system *of notation or any form of record* in which the thought of an author may be recorded and

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<sup>137</sup> Demers, 20.

<sup>138</sup> British case *Boosey v. Whight* of 1899 and American case *White-Smith v. Apollo* of 1908.

<sup>139</sup> Attali, 85.

<sup>140</sup> See Simon Frith, “The Industrialization of Music,” *Music for Pleasure* (New York: Routledge, 1988), 11-23.

from which it may be read or reproduced.”<sup>141</sup> A French ruling of 1905 made this conflation quite explicit:

[T]he thought of the author is as though materialized in numerous grooves, then reproduced in thousands of each disk or cylinder and distributed on the outside with a *special writing*, which in the future will undoubtedly be legible to the eyes and is today within everyone’s reach as sound; that by virtue of this repetition of *imprinted words*, the literary work penetrates the mind of the listener as it would by means of sight from a book, or means of touch with the Braille method; that is therefore a mode of performance perfected by performance, and that the rules of plagiarism are applicable to it. <sup>142</sup>

Recording is here mischaracterized *as* writing. Unlike printed scores, which provide written instructions for realization in sound, recordings are read by technologies that convert them directly into sound without substantial human intervention, more or less reproducing performances. Recording constitutes Ong’s “secondary orality,” since it deals in hearing and speaking, though the “speech” is displaced from the hearer by a degree of technology. Ong calls this “secondary orality,” one

of present-day high-technology culture ... sustained by telephone, radio, television, and other electronic devices that depend for their existence and functioning on writing and print. Today, primary oral culture in the strict sense hardly exists, since every culture knows of writing and has some experience of its effects. Still, to varying degrees many cultures and subcultures, even in a high technology ambience, preserve much of the mind-set of primary orality.<sup>143</sup>

Recording was recognized in copyright, as a “form of record” like notation, rather than as a secondary oral phenomenon that makes it possible to preserve and transmit music without notation. Both scores and recordings can “preserve” music, but, to return to Isidore of Seville once again, recording makes it possible for musical sound, even timbre and groove,

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<sup>141</sup> Emphasis added. Copyright Act 1909, Section 1e. See Jason Toynbee, “Copyright, the Work and Phonographic Orality in Music,” *Social and Legal Studies* 15, no 77 (2006), 83.

<sup>142</sup> *Le Droit*, March 5, 1905, in Attali, 98. Emphasis added.

<sup>143</sup> Ong, 11.

to be preserved, even if “it is [not] impressed on the memory.” Indeed, Jason Toynbee discusses the importance of recording to the blues and to Afro-American musical traditions more generally. The blues was the first genre to be preserved by recording (and not notation), presenting a problem for copyright: the oral blues tradition not only used but valued musical borrowing, challenging the “originality” demanded by copyright.<sup>144</sup>

The new technology of recording attracted avant-garde artists who wished to explore it, with Darius Mihlaud and Stefan Wolpe composing pieces for phonograph as early as the 1920s.<sup>145</sup> Bauhaus artist Laszlo Moholy-Nagy advocated for a repurposing of “reproductive” technologies (being the photograph and the phonograph) to be rendered “productive” by acute mastery of the re-productive technological procedures. After “perfecting the groove-manuscript score,” Moholy-Nagy believed it was possible to “write” quite literally on record, in a turn of phrase reminiscent of the 1905 ruling cited above.<sup>146</sup> The opposition between sound and thing is exposed in conceptual projects like this; while it seems theoretically possible to “write” or “compose” directly onto record, the way the object was made to interact with sound prevents the results from being sonically (and to a degree, culturally) intelligible.<sup>147</sup> Paul Hindemith and Ernst Toch developed this idea with two compositions of *Grammophonmusik*, entitled “Trickaufnahmen” or “trick-recordings,” in which the composers manually manipulated the recorded sounds of a cello and xylophone on the physical disc. Also working directly with the physical medium, French

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<sup>144</sup> Toynbee, 84.

<sup>145</sup> Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Durham, NC: Duke University Press, 2011), 37.

<sup>146</sup> Laszlo Moholy-Nagy “Production-Reproduction,” in *Moholy-Nagy*, ed. Kristina Passuth (New York: Thames and Hudson, 1985), 289.

<sup>147</sup> The repurposing of reproductive technology for creation eventually does take hold as an aesthetic with the rise of turntablism. However, the use of the turntable as instrument does still require pre-recorded material to serve this function.

composer and theorist Pierre Schaeffer pioneered *musique concrète* in his tape compositions of the late 1940s and 1950s, making extensive use of found sounds, though they were usually industrial and ambient rather than musical.

With recording treated as “writing,” it is already apparent how creators using borrowed recordings would encounter legal challenges. However, the aforementioned avant-garde projects were far enough outside the public consciousness to proceed largely uninhibited, and more importantly, they were not circulated commercially. When creators begin to borrow from popular recordings rather than using industrial found sounds as did Schaeffer, content owners became more inclined to make claims about ownership.

John Cage was one of the first composers to use prerecorded music in his *Imaginary Landscapes* compositions.<sup>148</sup> *Imaginary Landscapes No. 1* (1939) uses two variable-speed turntables, while *Imaginary Landscapes No. 5* uses 42 phonograph records, typically jazz.<sup>149</sup> In a personal letter to Peter Yates, Cage acknowledged that Hindemith and Toch had been a major inspiration for the first *Imaginary Landscape*, connecting the idea of “writing” on record and the repurposing of recorded music for a collage, avant-gardist aesthetic.<sup>150</sup> James Tenney, notably a student of John Cage, created the tape-composition *Blue Suede*, a large-scale cut-up of Elvis’s rendition of “Blue Suede Shoes,” (1961) with the snippets of Elvis’s vocals going from mere sonic fragments to recognizable words and phrases by the

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<sup>148</sup> McLeod and DiCola, 37.

<sup>149</sup> Cage used 42 jazz records in his original version to accompany the dance, *Portrait of a Lady*, though any 42 records may be used.

<sup>150</sup> See Leta E. Miller, “Henry Cowell and John Cage,” *Journal of the American Musicological Society* 59 no. 1 (Spring 2006), 85.

end of the piece. These works, too, were not circulated commercially, and were generally accepted to be “art music,” and thus escaped allegations of infringement.<sup>151</sup>

Goodman and Buchanan’s 1956 record, “The Flying Saucer,” created just a few years before Tenney’s collage, was the first commercial recording made of borrowed recorded elements over which a lawsuit arose. “The Flying Saucer” combined contemporary recordings of artists including Elvis Presley, Little Richard, and Fats Domino, into a narrative that evoked Orson Welles’s “The War of the Worlds” broadcast. These artists, easily recognizable by their distinct vocal styles, “respond” to a newly-recorded reporter’s questions regarding an “alien invasion.”<sup>152</sup> Clearly a work of parody (primarily of Welles’s radio hoax, and to a lesser degree of the artists’ vocal idiosyncrasies), “The Flying Saucer” used the sampled recordings to create a new narrative that had nothing to do with the original recordings. Goodman and Buchanan punned on performers names: the Platters are called “The Clatters,” Fats Domino as “Skinny Dynamo,” The Penguins as “The Pelicans,” and so on. With this juvenile humour, one can infer that while some criticism was directed towards the original recording artists, the primary target of parody was radio broadcasting and the emerging figure of the DJ.<sup>153</sup> While Goodman and Buchanan’s techniques were strikingly similar to Tenney’s, this work circulated commercially, and it sold well enough to attract the attention of the Harry Fox Agency, who sued for royalties for the sampled

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<sup>151</sup> It is also notable that Cage’s pieces exist mostly in score-form as very loose instructions for realization in sound; even if the same recording are used in multiple performances, the results will vary. *No. 5*, however, is explicitly described as a “score for making a recording on tape.” Since there is no “authoritative” version of the *Imaginary Landscapes* compositions, it would be impossible to make a case against them. See John Cage, *Imaginary Landscape, No. 5*, (New York, Henmar, c. 1961), introductory notes.

<sup>152</sup> Joanna Demers, *Steal This Music* (Athens: University of Georgia Press, 2006), 76.

<sup>153</sup> Upon whom Goodman and Buchanan would rely to program this and their next novelty record.

performers.<sup>154</sup> Fortunately, as the case proceeded, “a New York District Court judge threw the case out, claiming that there was no evidence that ‘The Flying Saucer’ posed any threat to the market for the original songs.”<sup>155</sup> Thus “The Flying Saucer” was absolved on economic, not aesthetic grounds. The differences between techniques of borrowing in art music and pop music are negligible, but the economic stakes make it worthwhile for content owners to pursue their interests in court.

It is in hip hop, however, that the tension between commercial possibility and aesthetics comes to a climax, with borrowing and reconstitution in instrumental backing tracks as a primary means of expression. A sample’s sources means just as much (to the informed listener, and especially to the producer) as the ways in which it is used to make new statements. After several lawsuits,<sup>156</sup> sampling came within the purview of law, and a new secondary-oral form of musical borrowing was quickly quashed by the strict application of copyright to recorded objects.

A major reversal occurs in the preceding history: copyright was first used to protect art music that was at risk of illegitimate publication, and eventually the use of borrowed elements in art music was overlooked, while the same practice in popular music was punishable.<sup>157</sup> At first, the protection of popular music by copyright seemed inconceivable, with the “taxing [of] light songs and ballads...the height of absurdity.”<sup>158</sup> 20<sup>th</sup> century claims regard borrowings in popular music almost exclusively, with the borrowed material coming from both popular and art music. Copyright best protects whichever music

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<sup>154</sup> Demers, 77.

<sup>155</sup> Demers, 77.

<sup>156</sup> Discussed in Chapter 4.

<sup>157</sup> Perhaps because pop music is transparently commercial, while art music is only implicitly so.

<sup>158</sup> *La France Musical* (March, 1850) in Attali, 78.

promises the greatest economic gain, because it is in these works that the stakes are highest for content owners.<sup>159</sup> Avant-garde works of the 1940s to 1960s were barely worth content owners' consideration because they were not commercially exchanged in any substantial quantity.

Copyright is a statutory matter, and thus does not have a basis in common law or natural law. It only began to regulate music after a long struggle; this system for the protection of intellectual property (in the form of written commodities) can only ever apply to recorded music imperfectly. Borrowing in music, because it is characteristic of oral (or secondary oral) practice, is at an even greater disadvantage, since it deals in speaking and hearing in a historical way. While borrowing may seem to *infringe* copyright, it is merely *incompatible* with it, at least when works with borrowed elements are circulated in physical form. Copyright cases regarding sampling in the 20<sup>th</sup> century that seek to protect some authors ultimately compromise others, suppressing mostly African-American oral traditions that are incompatible with copyright in this way. To better understand this fundamental incompatibility, a close reading of examples of borrowing in two oral music cultures, the Middle Ages and online mashup culture, will expose the tension between sound and thing, communal use and ownership, borrowing and copyright.

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<sup>159</sup> In the Renaissance, printed "art music" (including madrigals and keyboard variations) was lucrative, though in the 20<sup>th</sup> century, recorded pop music became the dominant physical music commodity.



### Chapter 3: Borrowing and Orality in the Middle Ages

As discussed in the previous chapter, borrowing as a musical practice takes place more frequently when music is not exchanged as a physical commodity. There are few to no disincentives for borrowing, and creators borrow for expressive purposes with meaningful results. In the Middle Ages, musicians thought of themselves as practitioners, not as artists. They earned their livelihoods as performers, albeit ones who happened to create new musical works. It was difficult to separate the singer and his or her song in secular music. Few professional musicians could read or write musical notation, making musical sound largely perishable in daily life, as described by Isidore of Seville. If one could not hear the singer, one could not hear the song. It is true that lower-status itinerant musicians like the jongleur and the minstrel sought out new songs in the courts, and they managed to preserve and disseminate troubadour and trouvère song by memory. Some of this repertoire was preserved in manuscripts created for nobles in the courts, but in daily life, music took place in acts of speaking and hearing, and was not easily distinguished from other quotidian activities. Because of the oral transmission of music in the Middle Ages, the era constitutes a useful precedent for understanding copyright's current conflict with secondary oral borrowing. The functional orality of Medieval manuscript culture parallels the "secondary orality" Ong describes in the age of radio, television, and film.<sup>160</sup> Both music cultures rely on a community for the transmission of music, both value dialogue with old sources, and both see works as the past as fertile grounds for new creation.

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<sup>160</sup> As described in the previous chapter. Walter Ong, *Orality and Literacy* (New York: Methuen, 1982), 11.

Musical borrowing was practiced more pervasively in the Middle Ages than in any other historical period. Although this era witnessed the (re)invention of musical notation, music continued to be a primarily oral practice. Scores served archival and pedagogical purposes, and were not typically used as sources to aide performance. Marshall McLuhan (notably a mentor to Walter Ong), observes in *The Gutenberg Galaxy* that manuscript culture is functionally an extension of oral culture: the fundamental shift in music takes place with the creation of a musical commodity in print.<sup>161</sup> Musical borrowing flourished in this oral music culture, with each genre at some point characterized by the use of pre-existing melodic material. In this way, the Middle Ages provide an important terrain for the theoretical concepts explored in the first chapter, confirming that the author, the work, and originality are constructs situated in history.<sup>162</sup> Many of the works discussed in this chapter are polyvocal, both in the literal sense that they are texted pieces with polyphonic musical textures (like the motet), and because the borrowed parts from different origins present different ways of “speaking” (as in the motet *enté*).

This chapter first addresses Medieval authorship and originality, including the function of authorship in secular manuscripts, and the attitudes towards authorship that these documents express. Employing terminology from Ruth Finnegan’s *Oral Poetry*, different artistic and social elements of orality are examined: first considering questions of composition in an oral music culture, then the intertwined techniques of oral transmission and performance. With a Medieval concept of orality established, it is possible to draw

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<sup>161</sup> Marshall McLuhan, *The Gutenberg Galaxy* (Toronto: University of Toronto Press, 1968), 94.

<sup>162</sup> Michel Foucault, “What is an Author?” in *Michel Foucault: Language, Counter-Memory, Practice: Selected Essays and Interviews*, ed. Donald F. Bouchard, trans. Donald F. Bouchard and Sherry Simon (Ithaca: Cornell University Press, 1977).

connections between musical orality and borrowing. Three secular pieces are presented as evidence of the oral practice of borrowing: a monophonic *motet enté*, a *chanson avec des refrains*, and a polyphonic motet featuring a refrain cento.<sup>163</sup> The chapter draws conclusions from these pieces and the previous discussion of orality, which provide a model for the next chapter's recommendations for contemporary copyright.

In the early Middle Ages, the name of the author was not yet an important categorizing function of discourse, in Foucault's terms.<sup>164</sup> The name of the musician who composed a work was no more important than the name of the carpenter who built a table: it only mattered that a work served its purpose. Because the author's name was not yet culturally valued, artistic works' authors were either received by chance, or lost. Two of the first musical authors' names were received by chance. Anonymous IV, likely an English student, studying in Paris in the late 13<sup>th</sup> century,<sup>165</sup> records the names of Léonin and Pérotin as great composers of organum.<sup>166</sup>

And note that Master Léonin, according to what was said, was the best composer of organa, who made the great book of organum from the gradual and antiphony to elaborate the divine service. And it was in use up to the time of Pérotin the Great, who edited it and made very many better clausulae or puncta, since he was the best composer of discant, and better than Léonin. But this is not to be said about the subtlety of the organum, etc.<sup>167</sup>

Anonymous IV emphasizes the *use* of these musical works ("to elaborate the divine service," "in use up to the time of Pérotin the Great"); the authors themselves were

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<sup>163</sup> All of these terms will be defined as they become relevant.

<sup>164</sup> According to Foucault, the author itself is a function of discourse. See Foucault, 113-115, and 127.

<sup>165</sup> On the identity of Anonymous IV and his authority on music, see John Haines, "Anonymous IV as an Informant on the Craft of Music Writing," *The Journal of Musicology* 23. no. 3 (Summer 2006), 275-425.

<sup>166</sup> Organum is an early form of polyphony that embellishes a single chant melody with a complementary harmonic line at fourth, fifth, or octave. Early organum consists of only one extra voice, but later organa composed by Pérotin have up to four voices in total.

<sup>167</sup> Anonymous IV, *The Music Treatise of Anonymous IV: A New Translation*, trans. Jeremy Yudkin, (Stuttgart: Hänssler-Verlag: American Institute of Musicology, 1985), 46:1, pg. 39.

considered secondary to the *usefulness* of what they produced: the creative practice took precedence over the objects it produced.

Authors of works of history, science, and religious philosophy were more likely to attach their names to their works for reasons of accountability and to establish “authority.”<sup>168</sup> For example, the name of the music theorist, philosopher and historian Boethius (480-524/5) survives since his writings were of a more “scientific” nature, citing Classical sources, and included in Medieval curricula along beside them. Because of this lack of attribution, questions of musical authorship abound. Authorship served political purposes, with the Church using “authors” to control regional artistic expression. The early chant repertoire was ascribed to Pope Gregory I (c. 540-604) for political reasons: Church officials created a myth that Gregory received the chant repertoire by dictation directly from the Holy Spirit in the form of a dove. This myth was perpetuated for the suppression of local chant traditions, and the enforcement of the official, standardized, Roman versions of the chant melodies.<sup>169</sup>

Medieval creators regarded composition as embellishment, or quite literally “building” upon the creations of the past. Gevaert writes,

Whereas in the modern epoch the composer’s first objective is to be original, to invent his own motive with their harmony and instrumentation, the composers...of liturgical chant worked in general with traditional themes, from which, through a process of amplification, they produced new chants...In music, as in architecture, invention consists in constructing new works with the aid of material taken from the common domain.<sup>170</sup>

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<sup>168</sup> Foucault, 126.

<sup>169</sup> See Piero Weiss and Richard Taruskin, eds. *Music in the Western World: A History in Documents*, 2<sup>nd</sup>. ed. (Belmont, CA: Schirmer, 2008), 35-37.

<sup>170</sup> Gevaert, quoted in Leo Treitler, “‘Centonate’ Chant”: ‘Übles Flickwerk’ or ‘E Pluribus unus?’” *Journal of the American Musicological Society*, 28. No. 1 (Spring, 1975): 6.

Gevaert obliquely references the concept of a public domain, to which all creations would have belonged before a formal system of intellectual property. While this type of creation does indeed build on work of the past, it is also distinctly transformative, recalling Demers's "transformative appropriation."<sup>171</sup>

Medieval thinkers interacted with sources from the past in both artistic and academic works. Glossing was a method of textual and musical embellishment, in which a user of a manuscript (that is, not its creator) added commentary in the margins of the book, or "between the lines," to better explain the text or to add personal reflections. Not only does glossing exemplify the Medieval love of scholastic embellishment, but it can also complicate the authorship of a document. Medieval scholars regarded reading more as dialogue than as sermon, and the tradition of lively interaction with sources can be gleaned from the practice of glossing.

It would be erroneous to suggest that there was no concept of authorship whatsoever in the Middle Ages, but authorship at this time surely served different purposes than in later eras. A concept of personhood had not yet been valorized and solidified by the kinds of thinking that emerged in the Renaissance and the Enlightenment. Instead, the intellectual and artistic contributions of individuals were part of a communal effort to understand the greater divine order. Much of this creative work was conducted under the auspices of the church, making the pride in personal contributions condemnable. Indeed, Medieval scholars devoted much time to the translation and transcription of literary and musical works with little expectation of reward, taking satisfaction instead from the

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<sup>171</sup> Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity*, (Athens: University of Georgia Press, 2006), 7.

knowledge that the resultant documents would be used, and would lessen the work of subsequent scholars. I hesitate to call this attitude towards creation “collectivist,” because Ruth Finnegan, whose work I discuss shortly, critiques this term as it refers to the creation of oral artistic works.<sup>172</sup> However, given the social organization of monastic life—from which emanated most chant melodies— it is tempting to relate the production of chant to the supportive, communal living of the people who created and used the chants most. Since chant melodies were first preserved in notation in the first half of the 10<sup>th</sup> century, they had remained relatively stable due to accurate transmission and, more importantly, extensive use. Like the beer crafted by Trappist monks, it is difficult to say where the work of one person ends and another begins. Regardless of who did what during the creative process, the entire community enjoyed the results of its labour.

Attribution became more important in secular music of 12<sup>th</sup> century. Manuscripts of secular song by troubadours, trouvères, and Minnesingers<sup>173</sup> were organized by author, with a portrait of the artist at the beginning of the section containing his or her work. Such manuscripts include the Codex Manesse, the Manuscrit du Roi, Bibliothèque National de France 854, and BNF 12473. In these manuscripts, not only were the images used for organizational purposes, they also communicated something of the songwriter’s life: troubadours who went on crusades are pictured on boats or horses; noblemen are depicted with their family crests, regalia, and symbolic animals; other distinguishing episodes, locations, or skills may also be depicted. Some used visual puns to help make the

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<sup>172</sup> Ruth Finnegan, whose research on oral composition will be discussed later at length, objects to the assumption that all oral poetry (and music) is produced collectively. See Ruth Finnegan, *Oral Poetry* (Cambridge: Cambridge University Press, 1977), 20.

<sup>173</sup> Singer-songwriters from southern France, northern France, and Germany, respectively.

songwriter's name more memorable, and to aid any illiterate person's (likely servants) navigation of the document.<sup>174</sup> Manuscripts organized in this way suggest an early "star system," with the name and image of the featured songwriters contributing to the prestige of the manuscript. However, the songs contained within the section for a given author are not necessarily "original" by modern standards: songs with borrowed elements were included with little or no generic differentiation, and the texts of songs written to accompany pre-existing melodies were also included. Sometimes a scribe included a title or author of the source materials, but sources must usually be discerned by cross-comparisons within the repertoire. In these instances the author's name was only important as functional organizing feature.

Certain types of textual authority were extremely important during the Middle Ages, and help to explain the reasons why certain scholars, melodies, and textual formulae were widely circulated. Much of Medieval scholasticism and pedagogy consisted of the internalization of texts through close study and memorization: creativity, even in the arts, was a practice of gathering these collected materials and synthesizing something new, more akin to the writing of an academic paper than the Romantic *ex nihilo* myth of artistic creation.

Jennifer Saltzstein writes,

A medieval author creates a new text through a process of gathering together and reinterpreting authorities, which are quotations from texts that have been stored in memory, then subjecting them to the four modes of hermeneutics.... Quotation is thus essential to medieval authorship. Further, a new composition will itself become authoritative only through the process of quotation and citation: it must be repeated in the compositions of other authors to acquire *auctoritas* [authority]. These texts

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<sup>174</sup> As in the case of Minnesinger Walter von der Vogelweide, whose last name means "of the field of birds": von der Vogelweide is depicted with a caged bird.

were internalized to the point that they became difficult to separate from the writer's own experience; in quoting an authority, the medieval writer effectively becomes its new author.<sup>175</sup>

Modern conceptions of artistic originality are not only inconsistent with Medieval ones, but they are nearly in opposition to them. Though it is easy to argue that no artist creates in a vacuum,<sup>176</sup> and that all works of art make use of general tools of works from the past, the Medieval creator internalizes an array of sources, and then purposefully uses specific quotations, entwining them with original thought to the extent that the differences between them are difficult to discern. Value and authority arise from the circulation and re-circulation of direct quotations and general ideas: thus a work that itself is a composite can be quoted, and the layers of borrowing can become quite difficult to disentangle.<sup>177</sup> Given this attitude towards originality and quotation, it is no surprise that most genres of Medieval music were characterized by musical borrowing at some time, or began as an offshoot of another genre.<sup>178</sup>

Quotation and citation do not relate to orality in the most obvious way, but there is certainly less textual stability to the work that circulated orally than the one that was composed for print. Ruth Finnegan's discussion of oral composition, transmission, and performance clarifies the connections between an orally-circulated work of music, and one that contains borrowed elements. Indeed, though her study concerns oral poetry, Finnegan

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<sup>175</sup> Jennifer Saltzstein, "Relocating the Thirteenth-Century Refrain: Intertextuality, Authority and Origins," *Journal of the Royal Musical Association* 135 no. 2 (2010): 265. Saltzstein here references Alastair Minnis, *Magister Amoris*, Jean Leclercq, *Love of Learning and the Desire for God*, and Mary Carruthers, *The Book of Memory*.

<sup>176</sup> Finnegan, 211.

<sup>177</sup> I return to this issue in Chapter 4 in my close readings of "George Bush Doesn't Care About Black People" and "Bacon Pancakes / Empire State of Mind."

<sup>178</sup> For example, the Sequence broke off from the Alleluia, and the Liturgical Drama began as a the "Quem Queritis" trope, which itself began as the Introit for Easter Sunday. See Hoppin 156-159 and 176-179.



does emphasize that “sung delivery is the most common characteristic of oral poetry,” making her conclusions applicable to music.<sup>179</sup> In Medieval musicology, Leo Treitler, initiated the theory of oral chant transmission. By applying the oral-formulaic theories of Milman Parry and Albert Lord<sup>180</sup> to early chant, Treitler argued that oral transmission was sufficient to preserve the chant repertoire until the notated sources of the 10<sup>th</sup> century.<sup>181</sup> Based on a study of Homeric epithets, Parry and Lord’s oral-formulaic theory claims that the *Iliad* and the *Odyssey* were composed orally, because of the combination of formulae that conformed to appropriate metrical patterns, as discussed in Chapter 1. Treitler claims that the immense chant repertoire was transmitted in the same way before notation. Singers learned the formulae associated with modes and types of chant, and “re-created” the chant based on these formulae.

If the singer has accumulated a repertory of standard formulas, each serves him when his knowledge of theme and formulaic system calls for a phrase of its characteristics. They belong to the complex of habits and associations that enable the singer to compose at high speed...[T]hat is not to say that the technique of oral composition depends on the singer’s retention of a stock of standard formulas which he strings together.<sup>182</sup>

In this way a large repertoire was preserved in a relatively stable form before the spread of notation.

Ruth Finnegan responds to the oral-formulaic theory, admitting that without it, any academic consideration of oral poetry would be impossible. However, she does not accept that all orally-composed works conform to the oral-formulaic model, because formulaic

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<sup>179</sup> Finnegan, 13.

<sup>180</sup> Finnegan, 6.

<sup>181</sup> Especially as in Leo Treitler, “Homer and Gregory: The Transmission of Epic Poetry and Plainchant,” *Journal of the American Musicological Society* 14 no. 2 (July 1974) 146-158.

<sup>182</sup> Treitler, “Homer and Gregory,” 356.

structure does not always indicate oral composition.<sup>183</sup> She suggests that some pieces, especially epics and long panegyrics were composed in this way, but many oral poems and associated music were carefully memorized for exact repetition—this is especially common in cases where the pieces have religious significance.<sup>184</sup> Other pieces would have been sung spontaneously, without the use of formulae or memory. Troubling the oral-formulaic theory, Finnegan shows the limitations of Treitler's theory; perhaps there are orally transmitted poetic forms that are more compatible with chant than the epic.

Regardless of the exact mechanics of chant transmission, if melody and text were memorized and internalized in the way that Saltzstein describes above, it seems impossible that orally transmitted music would *not* have possessed some amount of borrowing. Likely some combination of oral-formulaic creation and rote memorization took place, but it is surely beyond the scope of this project to consider this question in detail. Whether or not the pieces were memorized or re-created, the act of internalization would affect not only the manner of performance of these works, but the creation of new works as well. This is why many Medieval forms branch off of others. For example, when chant practitioners in Northern Europe were told that they must perform the standard Roman liturgy, they did, but they also added to it; internalized melodies became the basis for musical elaboration that included the required elements but also satisfied local preference and custom. Musicians made changes to music based on issues of practice. There was little concept of an “authoritative” version to which performances had to conform.<sup>185</sup> Music continued to be

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<sup>183</sup> Finnegan, 69.

<sup>184</sup> Finnegan, 80.

<sup>185</sup> Gregorian chant was “marketed” as if it had such an authoritative version, but this was largely for political reasons.

transmitted by “speaking” and “hearing,” rather than by the dissemination of music manuscripts.

Oral transmission and borrowing continue in the secular music of the 12<sup>th</sup> and 13<sup>th</sup> centuries, but they are further complicated by a greater reliance on writing. Finnegan asks if troubadours and trouvères can be considered oral poets, since they compose their works in writing, but their works are only fully realized when performed.<sup>186</sup> Indeed, troubadour and trouvère song, though preserved in writing, was circulated orally. Songs of the troubadours and trouvères were performed in the courts by the songwriters themselves, and for the entertainment of the masses by the less-skilled jongleurs and minstrels. The mixture of written composition and oral performance of troubadour and trouvère song is responsible for the melodic stability of both the newly composed melodies and their borrowed elements.

In oral poetic and musical traditions, it is not only difficult to differentiate between oral and written elements, but also between transmission and performance. Finnegan argues that, being inseparable, transmission and performance should be considered as a single complex belonging to an oral tradition.<sup>187</sup> At a very basic level, oral transmission (and performance) must be social, requiring both a singer and an audience, the latter of which will also include other singers who will re-create the performed work for others. In Ong’s words, “Sight isolates, sound incorporates.”<sup>188</sup> That is to say, the writing and reading of musical scores can be a solitary activity. But when a tradition is dependent on sound, one must rely on the knowledge of others as it is received face-to-face. In this setting, music is

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<sup>186</sup> Finnegan, 4, 19, 28.

<sup>187</sup> Finnegan, 169.

<sup>188</sup> Ong, 72.

the practice of a community. Learning the skills associated with an oral poetic or musical art is a sort of apprenticeship: young singers learn vocal techniques and repertoires from older masters, and eventually pass this information on to their own students.<sup>189</sup> Oral transmission itself is akin to quotation: a jongleur or minstrel hears a song performed at the court, and repeats it anew for different audiences, singing “as if” he were the troubadour or trouvère who composed it. As both Finnegan and Ong observe, oral pieces are more likely to exist in multiple versions, since performers (and eventually the notators) alter their songs for the given performance occasion.<sup>190</sup>

Even after the invention and spread of music notation, oral transmission continued to be the dominant method for the dissemination of music. Musical literacy was limited to scholars and singers employed by the church, and by the 12<sup>th</sup> century, also included a select few of the nobility who either employed troubadours, trouvères or Minnesinger, had extensive contact with them, or were songwriters themselves. Manuscripts of music notation were created for use in monasteries, convents, and courts, but they remained tools for reference, not performance. Since books were so costly, they were retained in libraries for consultation, and were displayed as luxury items by wealthy patrons. In daily music making, notation did not play an important role, with education, performance, and entertainment taking place largely without the use of scores. In other words, music did not rely on objects, but, as oral practice, it was a social activity that happened to result in works when they were needed.

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<sup>189</sup> Finnegan, 189, and Ong, 9.

<sup>190</sup> Finnegan, 148, and Ong 72, 177.

Music was transmitted orally, and by the 12<sup>th</sup> century there were more channels for the dissemination of music. The Crusades instigated large-scale travel across Europe and into the Middle East, with many monarchs bringing their chosen musicians with them. On the crusades, troubadours, trouvères, and Minnesingers came into contact with repertoires and instruments of other, allied courts, as well as Middle Eastern musical traditions, incorporating these into their own musical styles. For those fortunate enough to survive and journey home, the music that returned to courtly life in Europe was altered by contact with other musical traditions. Large-scale pilgrimages also brought musicians in contact with each other. Villages and towns on the routes to Rome, Jerusalem, and Santiago de Compostela saw an influx of pilgrims who brought their various musical traditions along with them. Travel associated with the crusades and pilgrimages allowed music to spread broadly across Europe without the aid of musical manuscripts.

Though notation allowed highly skilled scribes to preserve repertoires for their own use and for the libraries of patrons, music manuscripts were not used in daily music practice. Whether or not this orally-transmitted music was composed by the oral-formulaic technique or by direct memorization, musical borrowing is common in music that was orally transmitted and/or composed. As mentioned above, performers of these oral pieces were expected to tailor their performances for specific occasions and audiences, which often meant the incorporation of elements from other songs and poems when appropriate. Finnegan asserts that the changes to orally-transmitted pieces are not simply due to faulty memory, as has often been suggested, but that there are many incentives to creators and

performers to alter works during performance.<sup>191</sup> Ballads and other works that are structurally similar to them often feature refrains with “names, phrases, lines, clichés, whole stanzas and motifs [that] wander from song to song, when the dramatic situations are similar.”<sup>192</sup> Richard Taruskin claimed that the text and music of these refrains “circulated like proverbs.”<sup>193</sup> Not only did the reuse of familiar refrains aid in the composition of new works, but it also aided memorization, since the singers would have known these refrains before learning new songs that included them. These borrowed elements were meaningful only when they were realized in *sound*: the process of recognition and consequent enjoyment takes place as the song unfolds in time, and does not happen in the same way if the reference is observed in notation. As described in Chapter 1, audiences had to both hear and recognize these references, making the practice of borrowing fundamentally oral.

### **Some Medieval Case Studies: The Problem With Chant**

The previous discussions of orality and originality in Medieval music often reference centonate chant. The term “cento” comes from the analysis of ancient Greek and Latin poetry, which created poems in this same way by stitching together pre-existing phrases. In this oral-formulaic mode of composition, internalized melodic patterns are used to “re-create” a chant. Peter Wagner called these recurring melodies “wandering melismas”; they recur not only within single chants, but also in families of chant, united by mode, musical

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<sup>191</sup> Finnegan, 148.

<sup>192</sup> T.P. Coffin, *The British Traditional Ballad in North America*, 5, in Finnegan, 145.

<sup>193</sup> Richard Taruskin, *The Oxford History of Western Music* vol 1, 120, in Jennifer Saltzstein, “Relocating the Thirteenth-Century Refrain: Intertextuality, Authority, and Origins.” *Journal of the Royal Musical Association* 135 no. 2 (2010), 246.

features, and by these shared melismas.<sup>194</sup> By contemporary standards, one might be frustrated that works that are so “blatantly unoriginal” are so good.<sup>195</sup> Yet to the Medieval creator, not only is this unsurprising, but the expectation is nearly the inverse:

The reuse of traditional material in the plainchant was in no way perceived as evidence against the efficacy of the artist concept or the plausibility of the doctrine of original creation in that domain. On the contrary, the genius of Gregorian composers is manifested in the skill with which they *transformed* traditional material. That is an interpretation of the artist concept that corresponds exactly to the broadening of the doctrine of original creation to include revision and redaction, whether by Gregory the Great, by his successors in the papacy, or by anonymous papal or imperial composers.<sup>196</sup>

Treitler’s language evokes Joanna Demers’s “transformative appropriation,” and through her term, the “transformative use” of *Campbell v. Acuff-Rose* (discussed in Chapter 4). Though centonization may be evidence of both oral composition and transmission, it is not constitutive of borrowing in the manner that is most relevant to the present discussion. That is to say, centonization is less purposeful quotation for specific expressive goals, and more a utilitarian approach to the creation of melodies that are part of a larger but intensely interrelated repertoire. As Treitler suggests in “Centonate Chant,” theoretical analysis of centonate formulae, the kind that might be expected in the present discussion, would be inappropriate and uninformative. Since centonate chant was composed orally, a score-based analysis would not adequately account for formal and intertextual phenomena.<sup>197</sup> According to Treitler, analytical tools that were developed for scores were made to accommodate objects that were composed by a single author, at a single time, and have little use for products of a community over a great span of time. Though a detailed

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<sup>194</sup> See Leo Treitler, “Centonate Chant,” *Journal of the American Musicological Society* 28 no. 1 (Spring 1975), 9.

<sup>195</sup> Ong, 23

<sup>196</sup> Treitler, “Centonate Chant,” 6-7. Emphasis added.

<sup>197</sup> Treitler, “Centonate Chant,” 22.

study of a group of interrelated centonate chants could reveal much about borrowing in oral composition and transmission, for these purposes it seems more prudent to limit discussion to works that feature purposeful borrowing. Indeed, troubadours' and trouvères' borrowing techniques and goals relate much more closely to contemporary practices, and are thus more informative.

### **The *Motet Enté*: "En non Dieu, C'est la Rage"<sup>198</sup>**

The Old French term *motet enté* literally means "grafted motet"—they are monophonic compositions with "grafted" *refrains*. As mentioned in the previous chapter, Boogart advises that rather than considering the older material as haphazardly "grafted" onto a new composition, that instead, "the new work is 'grafted' on older material."<sup>199</sup> Similarly, Judith Peraino describes "famil[ies] of songs" that employ the same, oft borrowed melodic material.<sup>200</sup> Her approach challenges traditional ideas of originality and the stability of the work, but in a way that is faithful to the Medieval practice of quotation and authority. In the anonymous *motet enté* "En non Dieu, C'est la Rage," it is difficult to discern between the grafted *refrain* and the newly composed material. The *refrain*, "*En non dieu, c'est la rage/ que li maus d'amours s'il ne m'asoage*" is set to a closed melody that begins on G, rises to an F, and falls by stepwise motion back to G. The melody seems closed in its return to G (which functions as a central pitch), and because of this structure, it would be suitable for use in other contexts. Its proverb-like text is also broadly applicable: "In the

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<sup>198</sup> See Appendices A-1 for BnF 844 fol. 168 facsimile, A-2 for transcription, and A-3 for translation of "En Non Dieu, C'est la Rage.

<sup>199</sup> Jacques Boogart, "Encompassing Past and Present: Quotations and their Function in Machaut's Motets," *Early Music History* 20 (2001): footnote 6, pg. 2.

<sup>200</sup> Judith Peraino, "Monophonic Motets: Sampling, and Grafting in the Middle Ages," *The Musical Quarterly*, 85 no. 4 (Winter 2001): 658-659.



name of God, lovesickness is madness if I have no relief.”<sup>201</sup> “*En non Dieu*” is listed in Boogaard’s catalogue of refrains as number 665, with two extant concordances in other sources.<sup>202</sup>

Beginning on a G once again, and this time climbing the octave to G, the “newly-composed” melody undulates in the same style as the refrain, with a recurring pattern of upper-neighbour motion.<sup>203</sup> As if elaborating on the general pronouncement of the *refrain*, the lyrics continue, “Ne puis souffrir son outrage mon courage en retrairai de li partirai,” (I cannot suffer this outrage, I will withdraw my heart from it and take my leave of love). The penultimate line of music in Peraino’s transcription, however, breaks away from this structural pattern, instead using repeated Ds in an insistent text declamation that suits the obsessiveness of the text: “car quant la voi la voi la voi la bele la blonde a li mo’troi” (for when I see her, see her, see her, see her, the beautiful, the blonde, I grant myself to her). Such a contrast from the previous melodic content, “the final exclamation seems to be a musically derived series of repeated words with a concluding remark that resembles a *refrain* but has no other attested contexts.”<sup>204</sup> Perhaps the change in tone is due to the text, since it is at this point that the speaker loses his resolve to spurn the beloved. However, the difference between newly composed material and well-known refrains is telling: it is the opening refrain that seems more harmonious with the newly composed music than does the abrupt, impassioned ending of the motet. It is difficult to discern what is new and what

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<sup>201</sup> This, and all translations of “*En non Dieu*” translated by Peraino on 647, available in Appendix A-3.

<sup>202</sup> Nico van den Boogaard, *Rondeaux et Refrains du XIIe Siècle au Début du XIVe*. Paris: Editions Klincksieck, 1969. This catalogue compiles 12<sup>th</sup>- and 13<sup>th</sup>-century *refrains* from rondeaux, chansons, and romans. Unfortunately, Boogaard’s catalogue only preserves the texts of the refrains; further study on the stability of the melodies associated with them would help clarify the nature of these concordances.

<sup>203</sup> Peraino, 648.

<sup>204</sup> Peraino, 648.

is borrowed at first glance, and even more difficult if one does not consult a catalogue of *refrains*. Creators internalized *refrains*, and used them not simply as references but as a basic vocabulary for the creation of new works.

**Chanson avec des refrains: “Chançon Ferai”<sup>205</sup>**

Like the *motet enté*, the *chanson avec des refrains* also includes borrowed *refrains*. Composers of *chansons avec des refrains* are known by name more frequently than those of motets, and stylistically, the difference between newly composed melodies and refrains is more easily discernable. The *chanson avec des refrains* is in strophic form, featuring a different refrain at the end of each stanza. Thibaut IV, Count of Champagne and King of Navarre was a prolific thirteenth-century trouvères and composer of *chansons avec des refrains*. Much of his work is preserved in the *Chansonnier Cangé*, a rich source of secular song. Despite numerous pieces in other genres, there is only one *chanson avec des refrains* in this manuscript. “Chançon ferai, que talanz m’en pris” is a reflexive *chanson*; the speaker begins by announcing he will write a song after being spurned by a lady.

The *chanson* begins with three descriptive stanzas concerning the beauty and cruelty of the lady; in the next two, the speaker addresses her directly, making a plea for compassion; the piece ends with a short volta-like stanza, emphasizing the gravity of the poet’s situation.<sup>206</sup> Unlike those of the *motet enté*, the *refrains* of “Chançon ferai” are narratively and metrically distinct from Thibaut’s original verses. When the verse describes the lady, the *refrain* presents a plea to her; conversely, when the verse addresses the lady directly, the *refrain* comments in the third person like a theatrical “aside.” At the end of the

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<sup>205</sup> See Appendices B-1 for BNF 846 21v-22r facsimile, and B-2 for a translation of “Chançon Ferai.”

<sup>206</sup> Kathleen J. Brahney ed, trans *The Lyrics of Thibaut de Champagne* Garland Library of Medieval Literature (New York: Garland Publishing, 1989), 38-41. See Appendix B-2.

first stanza, Thibaut's speaker asks: "Je sent les max d'amer por vos, sentex les vos por moi?" (I feel love's sufferings for you, do you feel them for me?).<sup>207</sup> Numbered 1127 in Boogaard's catalogue, this refrain has five concordances, the most of any *refrain* in this *chanson*, including one concordance in the *Roman de la Rose*.<sup>208</sup> Since the *Roman* itself is composed of many proverb-like *refrains*, it is likely that the *refrain* originated elsewhere.<sup>209</sup> *Refrain* 1127 is quite melodically stable, though some variants of the text of the first half of the refrain do circulate in various sources.<sup>210</sup> However, the thematically important part of the refrain—"do you feel them for me?"—is stable both in text and melody.<sup>211</sup> Other refrains in order of appearance are 1225, 583, 1217, and 1692, as they are numbered in Boogaard's catalogue. Of these, 1217, 1692 (of stanzas IV and V) also have multiple concordances with other sources; for half of the *refrains* to have multiple concordances in extant sources, one might assume that Thibaut used *refrains* that were well known. Approximately 37 *refrains* with multiple concordances circulate in this corpus; "[t]hey exhibit a high degree of melodic stability and visual resemblance, often appearing with the same melody at the same pitch level, suggesting a genre-specific practice of musical borrowing."<sup>212</sup> That three of these 37 appear in Thibaut's *chanson* is impressive, and some indication that his audiences would have known these *refrains*.

"Chançon ferai" is a rare example of reflexive musical borrowing: not only does Thibaut delineate musically and textually the differences between the *refrain* and his newly composed verse, but he also comments on the process of composition in the lyrics. As a

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<sup>207</sup> Brahney, 39.

<sup>208</sup> Boogaard, 193.

<sup>209</sup> Saltzstein 259-261.

<sup>210</sup> Saltzstein, 260-261.

<sup>211</sup> Saltzstein, 261.

<sup>212</sup> Saltzstein, 252.

poet, Thibaut had interiorized orally-circulating *refrains*, and used them to compliment his own words and music. While Saltzstein argues that these chansons must have been disseminated in written form due to the stability of the refrains, there was still an oral element to their transmission in courts, and the work's realization in sound was crucial to the audience's understanding of the references contained in the *refrain*.

**The Refrain Cento Motet: "Qui Amours Veut Maintenir/Li Dous Pensers/Cis A Cui"**<sup>213</sup>

Cento technique was employed in secular music as well as in the chant repertoire discussed above. Mark Everist describes the refrain cento as the most "elusive" form of secular polyphony.<sup>214</sup> A motet featuring a refrain cento should (in theory) possess at least one voice that is composed entirely of successive *refrains*, creating a new musical and poetic entity. In "The Refrain Cento: Myth or Motet?" Everist seeks constituent works of this genre, asking how it might be different from the *motet enté*, eventually deciding that refrain cento is more accurately considered a technique, since so few pieces that conform rigidly to the generic criteria actually exist.

Beverly Evans performs a close reading of one thirteenth-century refrain cento motet, "Qui Amours Veut Maintenir/Li Dous Pensers/Cis, A Cui," from the Montpellier Codex.<sup>215</sup> The motet is named with an incipit for each of its three voices. "Cis, a Cui,"<sup>216</sup> the tenor line, is composed of nine refrains, each with different metres and rhymes, ranging

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<sup>213</sup> See Appendix C for a transcription of this motet. While much of the Montpellier Codex is available online at <http://manuscripts.biu-montpellier.fr/> "Qui Amours" was not included in the digitized folios. F-Mo. H196 (Montpellier Codex) fol. 316-319v.

<sup>214</sup> Mark Everist, "The Refrain Cento: Myth or Motet?" *Journal of the Royal Musical Association* 114, no. 2 (1989): 164.

<sup>215</sup> Beverly J. Evans, "The Textual Function of the Refrain Cento in a Thirteenth-Century French Motet," *Music & Letters* 71 no. 2, 187-197. See appendix X for a modern transcription.

<sup>216</sup> For a translation, see ed. Hans Tischler, *The Montpellier Codex: Part IV: Texts and Translations* (Madison: A-R Editions, 1985), 93-94.

from two to four lines in length. Of these nine, six have concordances in Boogaard's catalogue; five of these came from the broadly circulated *roman*, *Renart le Nouvel*, suggesting that the author used materials that were well known. *Refrains* featured in the tenor do not relate to each other in any obvious way, and instead are united by their *refrain* style as general pronouncements on love, and by poetic devices such as assonance and consonance.<sup>217</sup> In subject matter, the *refrains* are loosely united by "a high concentration of signs for the Lady...and the Lover" as well as consistent portrayal of the Lady as "other."<sup>218</sup> The tenor does have structure, however vague and associative:

[T]he ensemble of refrains which make up the entirety of a single voice does not represent a haphazard conglomeration. The juxtaposing of musical-textual quotations can be accounted for in terms of several related chains of associations.<sup>219</sup> The upper voices are related to the tenor both in terms of rhetorical structures, chiasmus, and in the representation of the two "characters" of the tenor.<sup>220</sup> The study of textual and musical relationships across multiple voices provides ample proof that a high degree of cohesion is, in fact, the rule rather than the exception in the motet... Refrain occupies a privileged position with respect to this methodology: the frequent inclusion of refrain in motets attests to its importance as structural support and, ultimately, as message bearer within the repertory at large.<sup>221</sup>

*Refrains*, which were circulated orally, provided the thematic and musical foundation—here quite literally constituting the lowest voice—for the creator of this motet. Medieval creators used borrowed materials for expressive purposes, and to put them in dialogue with their own newly-composed work. The musico-poetic structures that "wandered" most were ones that continued to speak to creators, with frequent re-use acting as a measure of cultural value. Each secular example considered in this section uses borrowed materials

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<sup>217</sup> Evans, 190.

<sup>218</sup> Evans, 192.

<sup>219</sup> Evans, 194.

<sup>220</sup> Evans, 193-195.

<sup>221</sup> Evans, 195.

purposefully: not for any lack of originality, but simply because a previous artist had already found the words and melody that expressed what the subsequent creator desired. Here, borrowing is practiced not as an end in itself, but rather to facilitate the creation of a new work, that itself may be mined for future use.

Musical borrowing was practiced extensively in the Middle Ages because ideas of authorship and originality valued communal benefit and continuing dialogue with established sources. Though notation enabled the preservation of Medieval sources, it was not used in daily practice; both sacred and secular music was transmitted orally in the Middle Ages, with scores serving as complement and archive to daily oral practice. Even when works were written down, they were only fully realized when performed. The memorization and accurate performance of oral works demanded highly skilled performers with large, memorized repertoires. Whether or not pieces were reproduced exactly or by oral-formulaic techniques, orally transmitted pieces often feature borrowed elements. Artists' internalization of valued artistic sources and repeated use made it possible for *refrains* to circulate in a variety of musical genres. Troubadours and trouvères used these *refrains* to comment on the newly written elements of their works, and to involve audiences who would have known the references. Though authorship did not yet serve contemporary discursive functions, it was used to organize texts and to lend "authority" to one's own work.

Notation, and a copyright system designed to serve and protect notated works does not accommodate oral practice. Issues of ownership of works of oral composition and transmission are complex. It is nearly impossible to legally attribute a work to a community, or to successfully compensate both a creator who borrows, and the ones *from*

whom she borrows. Mashups and hip hop sampling present many of these problems for copyright, albeit in the new technological guises of secondary orality. Chapter 4 considers these same issues of authorship, originality, composition, and transmission, in the mashup, using this discussion of Medieval borrowing as a theoretical guide.

## Chapter 4: Borrowing and Originality in the Mashup

When recorded music is treated as property, music with borrowed elements can only be practiced by those with the means to license samples, or at the artist's own risk. Musical borrowing has been practiced for centuries, as the previous chapters demonstrate, and is more prevalent in cultures that rely upon oral transmission. With the invention of recording, artists including Pierre Schaeffer, John Cage, and James Tenney began to repurpose reproductive technologies for creative purposes, using pre-existing recordings as materials for newly-composed works. This chapter argues that borrowing in online remixed music, like all recorded music, is a form of secondary orality. Like artists in the Middle Ages, mashup artists conceive of themselves as practitioners, not the makers of objects. Artists toy with objects and to undermine the commodity statuses of musical "things." Mashup artists value practice over object, process over outcome. Sampling's roots in the oral practices of hip hop influence the development of mashup. Hip hop and mashup artists alike place borrowed materials from different canons in dialogue to offer new criticisms. The mashup emerges at the confluence of hip hop sampling, *musique concrète* and tape collages in art music, and the DJ techniques of disco. Copyright comes into direct conflict with the mashup because of its (secondary) oral construction and transmission.

This chapter begins with a brief historical consideration of the advent of sampling. It then turns to the sampling lawsuits of the 90s and early 2000s that effectively forced artists to pay for licenses, stop sampling, or risk being sued. These cases suggest that recordings should be treated in the same manner as scores in regard to copyright, thereby exacting a measurable toll on musical creators who use borrowed elements. I argue that borrowing is



meaningful and purposeful, and should not be compared to plagiarism and physical theft. The chapter next turns to a discussion of Walter Ong's "secondary orality" as applied to hip hop by Tricia Rose. Techniques of composition, transmission, and distribution within "secondary orality" continue to take place within communities, though with the mediation of technology. I use three case studies to demonstrate the different ways that borrowing in the mashup is meaningful, and how these mashups are circulated within a community. The creation and dissemination of the mashup consists of practice, not things. Online mashup communities participate in dialogue, fostering continual discourse regarding music and culture more generally. The chapter concludes with a defense of the mashup as "transformative." Its practitioners contribute to an ongoing dialogue about genre, ideas of high- and low-culture, and their work and other works that use sampling, should be permitted to circulate because of these contributions.

Though most of the early examples of this repurposing take place in the "art" music tradition, it is hip hop sampling that is a direct ancestor of the borrowing in the mashup.<sup>222</sup> Mashups, now circulated online, spring from a DJ culture that essentially began as an extension of hip hop. The United States and the West Indies participated in a cultural exchange, one that brought about the importation of American DJ culture of the 60s, which was adapted and refracted into the sound system practice of "versioning."<sup>223</sup> Jamaican

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<sup>222</sup> Here, I use hip hop to refer to the music belonging to the subculture of the same name. Hip hop music involves rapping and DJing. DJs use samples to create instrumental loops which constitute the frameworks of new songs. Mashups emerge from both hip hop DJ culture and disco DJ culture: for these purposes hip hop is more relevant. The mashup will be defined at length later, but for now, it differs from hip hop sampling in that it combines only pre-existing elements—without a new rap over top—to make a new song. Borrowed elements in the mashup are minimally manipulated because intelligibility is paramount.

<sup>223</sup> A history of American, Caribbean and South American cultural exchange is outlined in Paul Gilroy's *The Black Atlantic* (Cambridge, MA: Harvard University Press, 1993). Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling*, (Durham, NC: Duke University Press, 2011), 51.

producers released different “versions” of the same song, manipulating or removing vocals, enhancing the rhythm section, and so on, for use at parties. Even before sampling in hip hop, Jamaican artists used borrowed elements as part of a shared musical vocabulary:

As in hip-hop, digital sampling of older music plays an important role in Jamaican music, with the canonized musical gestures of the 1960s and 1970s (horn riffs, the trademark drum rolls of roots-era drummers, or the exclamations of particular DJs) reappearing to provide the formal punctuation, timbral variation, and de facto historical grounding.<sup>224</sup>

Record labels in Jamaica, the United States and the United Kingdom (where these “versions” circulated) feared the possibility for plagiarism that these instrumental versions created: “They were nervous about releasing a pure instrumental record because someone else would almost certainly come along and re-release it with new vocals on top, getting a free ride.”<sup>225</sup> Versioning made recorded music available for play, creating the opportunities for new vocal tracks or new mixes. The record labels’ fear stems from skepticism towards oral music *practice* on the part of those who rely on musical *objects*. At this early moment content owners were already concerned for their economic rights, fearing that artists could benefit from their works and recordings without paying. Content-owners’ fears were more than realized when Jamaican artists imported their sensibilities to New York City, where the use of pre-recorded materials became a central feature of the genre that is now known as hip hop.

DJ Kool Herc brought the sound system from Jamaica to the South Bronx, and instrumental “versions” became popular at block parties. In addition to Jamaican records, New York DJs pioneered a variety of turntable techniques: DJs exploited the rhythmic

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<sup>224</sup> Michael Veal, *Dub: Soundscapes and Shattered Songs in Jamaican Reggae* (Middletown, Conn.: Wesleyan University Press, 2007), 193, in McLeod and DiCola, 52.

<sup>225</sup> McLeod and DiCola, 52.

“breaks” on funk, soul, and R&B records, looping them to maintain excitement, and to keep people dancing. Breakbeats were borrowed and repurposed for specific dance-based situations.<sup>226</sup> These parties featured a master of ceremonies, or “MC,” who would attempt to keep the crowd engaged, speaking over instrumental versions of songs imported from Jamaica, and over top of other rhythmic offerings from the DJ. Eventually the MC became as much of a draw as the DJ. The first commercially-released rap was The Sugarhill Gang’s “Rapper’s Delight” of 1979, which featured the instrumentals of Chic’s “Good Times.”<sup>227</sup> Attempting to capitalize on the growing popularity of hip hop in the Bronx, “Producer Sylvia Robinson...structured ‘Rapper’s Delight’ on the model of Bronx hip hop: a humorous rap set to a well-known funk or disco song.”<sup>228</sup> Hip hop did take on political issues as well; by 1982, Grandmaster Flash and the Furious Five’s “The Message” solidified MC Melle Mel as a lead performer, signaling that hip hop was something other than the one-time novelty “Rapper’s Delight.”

When the DJs and MCs of the emerging hip hop scene made the transition to the studio, they began to use digital samplers like the Fairlight and the Ensoniq.<sup>229</sup> Therefore sampling did not have to be performed live with turntables. In the 1980s, hip hop artists created a full-fledged collage aesthetic, moving away from the previous style that used only

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<sup>226</sup> For the purposes of this thesis, I have limited my discussion to the DJ culture of hip hop. However, techniques developed in disco were also essential to the creation of the mashup. DJs had to keep the transitions between songs smooth, and naturally song records overlapped to create this effect. For more see Tim Lawrence, *Love Saves the Day*, (Durham, NC: Duke University Press, 2003).

<sup>227</sup> “Rapper’s Delight” features a newly-performed, re-recorded instrumental version of “Good Times,” and not a sample. The newly performed version is so accurate that the mistake is understandable.

<sup>228</sup> Joanna Demers, *Steal This Music* (Athens: University of Georgia Press, 2006), 91.

<sup>229</sup> The Fairlight and the Ensoniq were digital sampling synthesizers invented in the late seventies and early eighties respectively. Both looked like traditional piano keyboards, but could be programmed with samples from a sound library. The earliest libraries were quite small, offering only a few kilobytes. Users could input their own samples, making these samplers appealing to hip hop artists.

a handful of samples per song. McLeod and DiCola call this era of hip hop collage, ranging from 1987-1992, “The Golden Age of Sampling.”<sup>230</sup> During this period, artists used as many as 20 samples in a song; the Beastie Boys’ *Paul’s Boutique* and Public Enemy’s *Fear of a Black Planet* contain some of the densest sampling collages in hip hop.<sup>231</sup> The legal status of sampling remained unclear: some artists obtained licenses, others did not, and no industry standard had been established. Contemporary with these developments in the 1980s, artists like Negativland and John Oswald used borrowed elements to create avant-garde cut-up pieces from pop music samples. Their works influenced mashup artists disseminating their works online in the early 2000s. Freelance Hellraiser, released the first mashup online in 2001,<sup>232</sup> with many similar works following on mashup sites like *Get Your Bootleg On*.<sup>233</sup>

As in the Middle Ages, creativity in hip hop and the mashup constitutes a gathering of pre-existing materials and the addition of original commentary. After gathering materials, musical creators recombine them to expose unlikely connections. Medieval creators used the same techniques in the refrain cento motet, as discussed in Chapter 3. Raps quite literally contribute newly-composed commentaries over top of a collage of borrowed and original parts. In the mashup, borrowed vocals often serve this purpose, though the location of the commentary is less consistent. The historical name of the author is less important than what the new composite work contributes to the community in which it is exchanged. Pseudonyms and stage names function similarly to troubadour and

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<sup>230</sup> See the chapter of the same name, McLeod and DiCola, 19-39.

<sup>231</sup> I revisit these albums later in this chapter, citing McLeod and DiCola’s breakdown of probable licensing fees for these two albums.

<sup>232</sup> “A Stroke of Genie-us” combined Christina Aguilera’s “Genie in a Bottle” with The Strokes’ “Hard to Explain.”

<sup>233</sup> *Get Your Bootleg On* is now accessible at [www.gyob5.com](http://www.gyob5.com)

trouvère names in manuscripts: they fulfill useful organizing functions, but they do not index “historical” people. Authorship in hip hop and the mashup is extremely removed from the author-genius model established in the Enlightenment and solidified in the 19<sup>th</sup> century because physical music commodities are no longer central to distribution. Contemporary forms of authorship are also affected by changing ideas of the individual: both hip hop and remix culture are situated in post-Enlightenment ideas of individuality, but are also tempered by strong senses of community.

In contemporary sampling culture, music is not exchanged or preserved with the use of notation, but instead relies upon recording. Walter Ong describes a “secondary orality” that functions in cultures that have come into contact with writing, though with the intervention of audio or audio-visual media, they are not directly dependent on writing.

Ong contrasts primary and secondary orality:

It is ‘primary’ by contrast with the ‘secondary orality’ of present-day high-technology culture, in which a new orality is sustained by telephone, radio, television, and other electronic devices that depend for their existence and functioning on writing and print. Today, primary oral culture in the strict sense hardly exists, since every culture knows of writing and has some experience of its effects. Still, to varying degrees many cultures and subcultures, even in a high-technology ambiance, preserve much of the mind-set of primary orality.<sup>234</sup>

Both mashups and these early sample-based works are exchanged within secondary oral cultures. Musical literacy, in the traditional sense, is not required to engage in the remixing of music: instead, practitioners must possess virtuosic listening skills, a broad musical frame of reference, and familiarity with production technologies. The primacy of the score reflected in music copyright is inconsistent with the values and techniques of sampling and remix.

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<sup>234</sup> Walter Ong, *Orality and Literacy* (New York: Methuen, 1982), 11.

Tricia Rose adapts Ong's concept of secondary orality to hip hop, the culture that originated sampling and which remains the direct ancestor of the mashup. An extension of African oral-poetic traditions, hip hop sampling confronts the issue of fair use:

Rap's oral articulations are heavily informed by technological processes, not only in the way such oral traditions are formulated, composed, and disseminated, but also in the way orally based approaches to narrative are embedded in the use of technology itself.<sup>235</sup>

Indeed, rap is characterized by poetry performed in heightened speech—this aspect of orality is obvious, but the assemblage of instrumental tracks also has an oral, composite character. As Rose observes,

These musical lines dominate production—even at the expense of the rapper's vocal presence. The arrangement and selection of sounds rap musicians have invented via samples, turntables, tape machines, and sound systems are at once deconstructive (in that they take apart recorded musical compositions) and recuperative (because they recontextualize these elements creating new meanings for cultural sounds that have been relegated to commercial wastebins). Rap music revises black cultural priorities via new and sophisticated technological means.<sup>236</sup>

Hip hop artists used samples to self-consciously place themselves in a musical history, one that was not based on notation. In privileging the score, copyright protects the descendant works of Western Art music, and is distinctly Eurocentric in its scope. By undermining the borrowing of recorded music, copyright compromises the African-American oral poetic traditions embedded in hip hop, inadvertently serving to efface a history that was already tenuously constructed. Hip hop artists use samples to assert an identity that was created in

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<sup>235</sup> A rap's text can be just as rich with allusion as the backing tracks are with samples (at least at the time when Rose was writing). In other words, rappers gesture towards other works in the same way that producers use samples. Such musical and poetic processes of signification (or here, signifyin') create a work dense with references. Tricia Rose, *Black Noise* (Middletown, CT: University Press, 1994) 64.

<sup>236</sup> Rose, 65.

the face of systemic oppression. Sampling lawsuits against African-American hip hop artists risk destroying this oral history in music.

Three copyright cases are particularly pertinent to the history of sampling, and later influence the circulation of online music remix culture. *Grand Upright v. Warner Bros.*, *Campbell v. Acuff-Rose Music*, and *Bridgeport Music v. Dimension Films* demonstrate the gradual prohibition and regulation of the musical borrowing of recorded music. Most sampling complaints are settled out of court, so these three cases provide important case law on the status of sampling in the United States.<sup>237</sup> *Grand Upright* was the first settled in court to address sampling specifically; it sets a dangerous precedent in its consideration of sampling as “theft.” *Campbell v. Acuff-Rose* shows the possibility for “transformative” use, yet despite being heard at the Supreme Court this case has not been frequently cited as precedent. The final case, *Bridgeport Music v. Dimension Films* famously demands that artists “get a license or do not sample,” thereby setting the industry standard, despite the fact that the Act itself makes room for even commercial use of borrowed elements if they constitute fair use.

In 1991, at the pinnacle of the “Golden Age of Sampling,” a Southern District of New York lawsuit changed the tone, making artists became more hesitant to sample and giving content-owners more incentive to sue. *Grand Upright v. Warner Brothers* was the first lawsuit to address sampling in which the artists did not settle out of court.<sup>238</sup> Hip hop artist Biz Markie sampled singer-songwriter Gilbert O’Sullivan’s “Alone Again, (Naturally)” in his

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<sup>237</sup> And in Canada, given that major American content owners and American case law exercise considerable pressure over Canadian legislation.

<sup>238</sup> *Grand Upright Music Ltd. v. Warner Brothers Records, Inc.*, 780 F. Supp. 182; LEXIS 18276 (S.D.N.Y. December 16, 1991).

similarly-titled song, “Alone Again.” Lawyers at Markie’s label, Cold Chillin’ Records, sought a license for O’Sullivan’s song. When it was denied they released the song without the appropriate license. Judge Kevin Thomas Duffy took Cold Chillin’s disregard for O’Sullivan and Grand Upright’s wishes as alone constitutive of purposeful infringement.<sup>239</sup> Duffy’s opinion illustrates how ill-equipped non-specialists in the field of either copyright or music can be in adjudicating sampling complaints. Duffy’s opinion famously begins with the Eighth Commandment: “Thou shalt not steal,” and what follows was hardly more informed by current practice than this first proclamation.<sup>240</sup> Gilbert O’ Sullivan and Grand Upright Music were granted a preliminary injunction against Markie and Cold Chillin’ Records. Duffy even “referred the case to the U.S. Attorney for the Southern District of New York for possible criminal prosecution.”<sup>241</sup>

The defense could have claimed fair use, since the song is a work of parody, but there is no evidence of this line of argumentation in Duffy’s opinion. However, before even reaching the need for a fair use defense, the defense counsel did not raise the question of whether or not Markie’s sampling was “de minimis”—that is, if it was great enough to reach a threshold of substantiality that can only be determined on a case-by-case basis. In this particular song, though the titles are nearly the same, Markie only borrowed three words and a piano accompaniment from O’Sullivan’s original. Considering lyrics and melodies are a song’s copyrighted elements, it is doubtful that Markie’s harmonic borrowing and three-word quotation reached the de minimis threshold. Duffy’s opinion did not address these fundamental copyright issues, instead framing Cold Chillin’s unsuccessful request for a

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<sup>239</sup> See McLeod and DiCola, 133.

<sup>240</sup> *Grand Upright v. Warner*, at \*1.

<sup>241</sup> McLeod and DiCola, 133. *Grand Upright v. Warner*, at \*8.



license (and subsequent release) as an admission of guilt. The UCLA Music Copyright Infringement project suggests that *Grand Upright v. Warner Brothers* may have been a moral rights complaint in disguise; that is to say, O'Sullivan and Grand Upright were more concerned with the association of their song with a rap artist than they were with any questions of infringement.<sup>242</sup> However, *Grand Upright* is later taken as precedent in *Bridgeport v. Dimension*, and its poor jurisprudence influenced subsequent case law.

Musical borrowing did see one success, however, in the 1994 case *Campbell v. Acuff-Rose Music*.<sup>243</sup> Reaching the Supreme Court, *Campbell v. Acuff-Rose* shows the potential of a fair use defense, and that even a commercial work of borrowed elements, if parodic, can continue to circulate in commercial form. 2 Live Crew appropriated<sup>244</sup> Roy Orbison and Bill Dees's "Oh, Pretty Woman" in their song of the same name. Luther Campbell of 2 Live Crew (also known as Luke Skyywalker), claimed in an affidavit that he intended "though comical lyrics, to satirize the original work..."<sup>245</sup> The District Court ruled that the rap track would not "adversely affect the market of the original," but Orbison and Acuff-Rose Music appealed. Supreme Court Justice David Souter admitted that "2 Live Crew's song would be an infringement of Acuff-Rose's rights in 'Oh, Pretty Woman,' under the Copyright Act of 1976...but for a finding of fair use through parody," ruling in favour of Campbell.<sup>246</sup> This particular parody, in Souter's opinion,

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<sup>242</sup> "Grand Upright v. Warner 780 F. Supp. 182 (S.D.N.Y 1991), on *Music Copyright Infringement Resource*, <http://mcir.usc.edu/cases/1990-1999/Pages/granduprightwarner.html>

<sup>243</sup> Luther R. Campbell et al. v. Acuff-Rose Music, Inc., 510 US 569, LEXIS 2052 (March 7, 1994).

<sup>244</sup> *Campbell v. Acuff-Rose* did not address sampling specifically, since 2 Live Crew did not use a sound recording, instead parodying Orbison and Dees's work.

<sup>245</sup> *Campbell v. Acuff-Rose* at \*572.

<sup>246</sup> *Campbell v. Acuff-Rose*, at \*573. Souter's ruling suggests a liberal approach to musical works, although recordings continued to be treated literally as "property" in *Bridgeport*. These inconsistencies illustrate a counter-intuitive privileging of the rights in recordings over those that subsist in works.

ha[d] an obvious claim to transformative value, as Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creat[e] a new one.<sup>247</sup>

It is this “transformative” nature of musical borrowing that should be protected. Indeed, music plagiarism does exist, but sampling in order to create a new work with original commentary is transformative, not plagiarism. By the time 2 Live Crew sampled “Oh, Pretty Woman,” the song was part of the public consciousness, if not part of the public domain. The hip hop group’s use of the classic tune is akin to Thibaut de Navarre’s use of broadly-circulating *refrains*: both instances of musical borrowing are “transformative,” to use Justice Souter’s term. Souter’s reading of the Act is more nuanced than Duffy’s; while 2 Live Crew’s sampling may constitute infringement, there are provisions such as fair use and the *de minimis* principle that allow artists to reuse works even when their actions otherwise constitute infringement. Although *Campbell v. Acuff-Rose* was indeed a high profile case, and at a higher court than *Grand Upright v. Warner Bros.*, it is not cited extensively in case law. Surprisingly, it is *Grand Upright* and not *Campbell v. Acuff-Rose* that is taken up as the precedent in the most influential sampling lawsuit.

*Bridgeport Music, Inc. v. Dimension Films* was a major setback for sampling, and confirmed *Grand Upright*’s suggestion that obtaining a license should be standard industry practice.<sup>248</sup> In 2005, Bridgeport Music sued Dimension Films for using N.W.A.’s “100 Miles and Runnin,” which sampled Funkadelic’s “Get Off Your Ass and Jam,” in the film, *I Got the Hook Up* (1998). Dimension Films properly licensed the N.W.A track, but unbeknownst to them, N.W.A. did not obtain a license for the Funkadelic sample in “100 Miles and Runnin”

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<sup>247</sup> *Campbell v. Acuff-Rose*, at \*579.

<sup>248</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F. 3d 792; LEXIS 10140 (Sixth Circuit, June 3, 2005).

when the song was first recorded in 1990. The sample in question is a two-second guitar shriek from the opening of the original Funkadelic track; removed from its original context and processed heavily, the “Get Off Your Ass and Jam” sample is barely recognizable. N.W.A. looped the sample, lowered its pitch, and placed it in the back of the mix, so that the average listener would not notice any connection between the songs. Ruling on this case, Judge Ralph B. Guy invokes *Grand Upright*’s opening biblical proclamation (“Thou shalt not steal”), establishing a “bright-line”<sup>249</sup> rule for the use of sampled *recordings* in new works. Judge Guy’s oft-quoted opinion includes the recommendation “Get a license or do not sample. We do not see this as stifling creativity in any significant way.”<sup>250</sup> This ruling essentially eliminated the de minimis principle, which protects artists borrowing from copyrighted works when the amount is minimal. No amount of a recording, it seems, is too small to be protected.

According to Judge Guy, recordings deserve more (and different) protection than works:<sup>251</sup> “[w]hen those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.”<sup>252</sup> Guy’s ruling misunderstands the nature of recording as commodity. Even though sound is contained within a music container technology, the “song” itself is not identical with any physical

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<sup>249</sup> An objective distinction in law that offers little room for interpretation.

<sup>250</sup> *Bridgeport v. Dimension Films* at \*20.

<sup>251</sup> Copyright offers “works” and “recordings” different protections. The “work” is the song as it is commonly conceived: the words and music (though chords are not expressly protected). “Works” are typically owned by publishers. The “recording” is just that: the “master” recording, likely owned by the record label, or a third-party by transfer. To license a song, (in theory) one must obtain rights to both the “work” and the “recording.”

<sup>252</sup> *Bridgeport v. Dimension Films* at \*22.

object.<sup>253</sup> It passes through time as a sound phenomenon, much as described by Isidore of Seville. There is no way that N.W.A. executed any “physical taking” by sampling a recording, since they borrowed Funkadelic’s sounds, not a physical object. Guy’s opinion also betrays a problematic preference for art music; his judgment of hip hop by the criteria of a notation-based tradition is inconsistent with the history and aesthetics of hip hop: “It is not like the case of a composer who has a melody in his head, perhaps not even realizing that the reason he hears this melody is that it is the work of another which he had heard before.”<sup>254</sup> In this passage, Guy takes the composition of Western art music as the standard for all musical creation. Guy’s ruling does not address fair use or the de minimis principle. By ignoring these fundamental copyright checks and balances, Guy’s opinion risks “stifling creativity” in a very significant way. However problematic, *Bridgeport* has become an important precedent, and its broad effects on transformative creativity in music at large cannot be overestimated. *Bridgeport* overlooks the fact that part of the meaning of the sample *is* its borrowed character: the compression and the overall sonic character of a sampled recording are impossible to replicate. Interpolation, or re-recording a sample in the studio (as *Bridgeport* suggests as a viable alternative to sampling) will have neither the same aural effects, nor the musical and personal significance of sampling.<sup>255</sup> Although there is a framework in place for artists to license samples (if they have adequate resources), obtaining a license is seldom aligned with the attitudes and traditions of the individuals who sample.

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<sup>253</sup> See Jonathan Sterne, “Is Music a Thing,” in *MP3: The Meaning of a Format* (Durham: Duke University Press, 2012), 194-196 for more on container technologies in music.

<sup>254</sup> *Bridgeport v. Dimension* at \*20.

<sup>255</sup> *Bridgeport v. Dimension* at \*20.

*Bridgeport* sets the standard for licensing, and major labels now require their artists to obtain licenses for all samples, since sampling has become such a legal liability.<sup>256</sup> Thus the practice in the music industry has become inconsistent with the Act in the United States: no label wants to risk an expensive lawsuit, or further risk that a judge might find a sample surpasses the de minimis threshold or does not constitute fair use. Sample licensing has become a profitable business, with the process of clearing a sample taking large amounts of time, varied negotiations, and uncertain results.<sup>257</sup> This process is extremely cost-prohibitive, and only affordable for artists who are already associated with major labels. Most importantly, *Bridgeport* perpetuates a variety of misconceptions about music copyright and sampling that are not supported by the Act itself, most of which stem from the misunderstanding of the differences between recordings and scores.

Duffy's and Guy's opinions treat recordings as if they were scores. *Duffy* considered Biz Markie's sampling as literal "theft," while *Guy* claimed N.W.A.'s was a "physical taking." Neither considered whether this "appropriation" was "transformative"; they simply observed the use of pre-existing recordings as a theft without considering the borrowing's function. There was no intent to deceive the listener that these samples were original; indeed, the origins of both samples are meaningful in their new contexts. Markie even titled his own song after O'Sullivan's: there was no attempt to pass the harmonic progression and lyrical hook off as his own. Even according to Guy, if a composer *writing* a new piece were to quote a pre-existing work in his own, there would be no question that this would constitute an "intellectual" borrowing rather than a "physical" one. Yet even in this case, the

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<sup>256</sup> McLeod and DiCola, 150.

<sup>257</sup> See McLeod and DiCola's in-depth in their chapter "The Sample Clearance System," 148-186.

score is not identical with the “music” because it must be realized in sound; the composer’s reference would only become meaningful when it was *heard*. Before this, the composer’s notational symbols only provide a *representation* of the musical quotation, a suggestion of it, an approximation.

Recordings also “represent” music, but they represent the musical sounds themselves. Sound reproduction technologies do not “read” recordings in the same ways musicians “read” scores: the representation contained within a recording approximates the original performance by recreating the same sound waves by agitating a diaphragm. That is to say, the recording removes the requirement of notation, and thus the involvement of the eye, for musical reproduction. Recording translates an original performance (in its simplest form, recorded by a microphone), into a container technology (a record, a tape, a digital file), and back into sound directly, with the same vibrations re-created by speakers or headphones. Recording itself allows for a preservable oral music tradition, with transmission from mouth to ear with the mediation of technology.<sup>258</sup> Digital music is the least physical of all mediums thus far (Sherburne and Sterne refer to this as the “micromaterialization” of music),<sup>259</sup> and yet it is treated the most literally as property.

The ability to borrow recorded music should not be reserved for those with the means to pay. When the most successful artists are the only ones who can afford to license samples, the artistic results of sampling will be compromised. The artists who might use samples to create a critique of the capitalist system (that requires licensing) are not typically associated with major labels. Without the contributions of their voices, sample-

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<sup>258</sup> I have simplified these issues in terms of singing and hearing, though the same holds true for instrumental music, and for digital music, as will be addressed soon.

<sup>259</sup> Sterne, 194.

based works risk confirming dominant values much of the time. Thus rulings like *Bridgeport* and *Grand Upright* negatively affected artists, making sample licenses cost prohibitive, and sampling without licenses risky.<sup>260</sup> After the “Golden Age of Sampling” was cut short in 1991, artists no longer employed collage aesthetics, instead using one or two recognizable samples.

Public Enemy’s *Fear of a Black Planet* and the Beastie Boys’ *Paul’s Boutique* simply could not have been made in a post-*Grand Upright* licensing climate, let alone a post-*Bridgeport* one. In *Creative License*, McLeod and DiCola used historical licensing fees to estimate the cost of clearing samples on these two albums, and their results were truly shocking.<sup>261</sup> They take into account not just the sample costs, but also transaction costs, since all licenses would have to be procured with the assistance of a sampling clearance professional. According to McLeod and DiCola’s estimates, *Fear of a Black Planet* would have lost \$6,786,000, and *Paul’s Boutique* would have lost \$19,800,000. Both figures include estimated album sales.<sup>262</sup>

In the case of the two records examined here, the artists pay out more than they receive. Neither album would be commercially practical to release. Each artist, having licensed away more publishing than the amount that they would receive on each track of the album, *would go further into debt with every copy sold to the public*. The prices for all of the samples—multiple samples on each track—simply exceed the artist’s piece of the recording revenue pie.<sup>263</sup>

Obviously licensing (and the copyright that requires it) is not working when licensing costs are greater than what an album will earn. Though it makes uses of a total of eighty-one

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<sup>260</sup> The effects of *Bridgeport* reach beyond the music industry, making it more difficult to release documentary films that require too many musical licenses. For example, it has been impossible to release Danny Tedesco’s documentary *The Wrecking Crew* since 2008 because of licensing challenges.

<sup>261</sup> See 203-211 in McLeod and DiCola for their full methodology.

<sup>262</sup> McLeod and DiCola, 207-208.

<sup>263</sup> McLeod and DiCola, 210.

identifiable samples, *Fear of a Black Planet* is an original album, and it is unfair that Public Enemy deserves less of the album proceeds than all (or any) of the artists they sample.<sup>264</sup> Even some of the most successful artists in the industry today encounter challenges with licensing; even when one can afford to license a sample, it is still possible for the original artist (or the owners of the copyright and/or masters) to decline. Kanye West was not permitted to license a sample of Lauryn Hill for his song “All Falls Down,” and employed another vocalist, Syleena Johnson, to re-perform Hill’s melody as an interpolation.<sup>265</sup> Even when one has the means to pay, the licensing process is not straightforward.

The previous chapters considered the questions of “transmission” and “performance” as inseparable in oral music cultures, but in online music remix culture, both are more accurately subsumed under “distribution.” Some artists<sup>266</sup> who use borrowed elements “perform” live, creating new songs with a turntable, a computer, or a sample-pad in front of a live audience. However, more listeners encounter these “live” remixes works online than they do at live events. As in the Middle Ages, works are passed along more by the efforts of individuals who are members of a community than by the efforts of a corporate distribution system. Online “likes,” “shares,” and the number of “views” helps to circulate mashups in communities like those on mashup-charts.com, Soundcloud, Youtube, Playable, and on forums associated with artists’ individual websites. As with Medieval *refrains*, aesthetic value can be gauged based on how much a given mashup or element is circulated. The score has no place in the exchange of the music of

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<sup>264</sup> The same goes for *Paul’s Boutique*, at 125 samples. Both totals are taken from McLeod and DiCola, 207-208.

<sup>265</sup> Whether or not Hill had the right to say no is beyond the scope of this chapter. See McLeod and DiCola, 171.

<sup>266</sup> Including Madeon, Girl Talk, Kid Koala, and others.



online remix cultures: works are circulated based on an economy of re-speaking and hearing, or secondary orality. Indeed, these cultures are, on some level, dependent on writing, yet the exchange of mashups does not rely on *musical* literacy.

Though the members of these communities need not have the ability to read or write musical notation, they require cultural literacy. For a borrowed element to be meaningful, one must first recognize that a musical creator *is borrowing*, and know the original from which he or she has borrowed. Mashups are exchanged in communities that understand creators' references and approach works of the past with a sense of irreverent play. Mashups constitute a sort of online dialogue, and are shared not for traditional compensation, but for subcultural capital, which, as in the case of Danger Mouse, can sometimes be traded for capital.<sup>267</sup> Mashup artists like Danger Mouse circumvent traditional means of capital, but can eventually redeem subcultural capital for *capital* itself. These artists migrate to mainstream methods of exchange, using subcultural capital as a cachet to support future projects. Skill in creating mashups is assessed primarily on the artist's ability to listen, and secondly on virtuosic skill with digital production technologies. According to Shiga, the specialized listening of the mashup producer is best described as Sterne's "audile listening."<sup>268</sup> These producers must listen not only for basic musical elements that would make different tracks compatible, but must also constantly listen for the *potential* of recombination.

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<sup>267</sup> It is not within the scope of this thesis to fully discuss the functioning of mashup communities or their "subcultural capital." See Shiga, and Sarah Thornton, *Club Cultures* (Cambridge: Polity Press, 1995), on how subcultural capital can be traded for capital.

<sup>268</sup> See John Shiga. "Copy-and-Persist: The Logic of Mash-Up Culture," *Critical Studies in Media Communication* 24 no. 2 (June 2007), 98, and Jonathan Sterne, *The Audible Past: Cultural Origins of Sound Reproduction*, (Durham NC: Duke University Press).

The pertinent question is *not* how digital technology impacts musical culture in such a way as to produce mash-up remixing, but what type of sensibilities, practices, institutions and technologies enable remixers to “listen together.”<sup>269</sup>

Imagining songs together requires “audile listening” and imagination, but not notational “literacy”—the skills required in the successful creation of mashups and other composite remixed music are not consistent with the musical values that copyright protects. Online remix culture constitutes a secondary oral culture in which the skill of listening is more important than any notational literacy. Mashup creation is a musical practice, one that does not rely on notation but instead consists of acts of “speaking” pre-recorded works in new contexts. Listeners participate by “hearing” works that circulate within a community. The mashup constitutes secondary orality in that it displays characteristics of oral composition (using recording as mediated orality), but it is exchanged in a literate culture. Exchange, production, commentary, and dissemination—these practices are all more important to the mashup than any musical object, recorded or notated.

The mashup is a song made of borrowed recorded parts. A DJ combines elements from two or more songs, usually divided as instrumentals and vocals,<sup>270</sup> to create a new, composite song that is roughly the length and form of a typical pop song.<sup>271</sup> The traditional versus mashup combines the instrumentals of one track with the vocals of another. This was the first type of mashup to circulate online, and remains perhaps the most popular since it is (in production terms) the easiest to make.

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<sup>269</sup> Shiga, 98-99.

<sup>270</sup> Though some artists separate beats and individual instruments, others use both instrumentals and vocals from one song. DJ Earworm does this frequently. In his mashups, elements from the same song seldom appear together.

<sup>271</sup> From 2 minutes to 5 or more, mashups usually take the length and form of one of the sampled songs as a guideline, and build upon that. By these criteria, I exclude artists like Girl Talk from my definition of mashup. Though using borrowed musical elements, his tracks are not like new songs in length or form. They are still part of remix culture, and are largely circulated online, but they are not mashups, strictly speaking.

In DJ Lobsterdust's "Knock Out Eileen," LL Cool J's rap from "Mamma Said Knock You Out" is mashed with Dexys Midnight Runners' "Come On Eileen."<sup>272</sup> LL Cool J's vocal track sounds strangely melodic when paired with the tuneful but campy Dexy's instrumental. While LL Cool J boasts of "lyrics that'll make you call the cops," he is engaged in a fruitless musical dialogue with an inestimably incompatible partner. "Come on Eileen" is itself a plea, and a one-sided conversation with the titular "Eileen" to take the speaker back. In this light, LL Cool J presents himself quite literally as "all talk," since the threats in his lyrics are defused by his new instrumental environment. While LL Cool J's reflexive rap addresses the power of the word, the Dexys track is also about words and persuasion: the first verse about a sad DJ, who "moved a million hearts in mono." Ultimately, the lilting, stereotypical Irish "toora loo rye ay" is used to woo Eileen without words. When LL Cool J's boast is forcefully combined with a plea in the style of 50s vocal groups, the main lyrical-rhetorical goal in the mashup is obscured. With LL Cool J's threat neutralized, his performance can be enjoyed for other aesthetic reasons. Pleasure can be found in the artifice of his performance, in the textual and narrative formulae, stylized delivery, and in the gun-like "sound effects" that LL Cool J uses to emphasize his threat.

The recombined elements in this mashup create a synthesis, a new song that reflects on the function of hearing and the power of speaking. In a sense, "Knock Out Eileen" addresses orality in the setting of a musical dialogue. The meaning of the piece with borrowed elements is different: not simply because the original works are presented in a new context, but also because they are no longer perceived as "original" objects. When

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<sup>272</sup>The Dexy's track itself is already a strange stylistic amalgam of soul, Celtic fiddling, American folk and new wave. Knock Out Eileen (LL Cool J vs Dexy's Midnight Runners)." YouTube video, 3:32. Posted by thriftshopxl, July 14, 2010.

considering the *motet enté*, Peraino asks what a grafted, or composite thing means, and “Knock Out Eileen” asks its listener what a mashed-up thing means.<sup>273</sup> These songs are scavenged, perhaps forgotten and tossed in Rose’s “wastebin,” but they are given new life in a campy setting that takes neither seriously. The posturing seriousness of LL Cool J’s rap is confronted with the unabashedly poppy Dexy’s instrumental, inspiring questions of sincerity and genre that are only possible when two works converse directly in borrowed form.

Fostering discussion in a different way, “George Bush Doesn’t Care About Black People” asks difficult real-life political questions through music. In *The Public Domain*, James Boyle traces the origins of this pseudo-mashup<sup>274</sup> “from spiritual to controversial viral hit.”<sup>275</sup> In the astutely titled “I Got a Mashup,” Boyle unravels the various cultural strands that were woven together to create “George Bush Doesn’t Like Black People,” and why copyright does not accommodate works with borrowed elements such as this.

During a televised fundraiser for Hurricane Katrina relief, Kanye West, enlisted as a celebrity host, lost his composure, and began to rant about how poor Louisiana blacks were being portrayed in the media coverage of the disaster. His co-host, Mike Myers, attempted to get the situation under control. After a seemingly scripted recovery, West interrupts Meyers stating, “George Bush doesn’t care about black people!”<sup>276</sup> Also incensed over the

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<sup>273</sup> Judith Peraino, “Monophonic Motets: Sampling, and Grafting in the Middle Ages,” *The Musical Quarterly*, 85 no. 4 (Winter 2001): 656.

<sup>274</sup> I’ve called this a pseudo-mashup since “George Bush Doesn’t Like Black People” combines sampled work with newly performed material; in this case a new vocal track. Traditionally mashups are understood as the combining only pre-existing materials, and while “George Bush” does include new material, it demonstrates the mashup tendency in its approach to borrowing.

<sup>275</sup> James Boyle, “I Got a Mashup” *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press), 2008.

<sup>276</sup> Boyle, 125. See also “George Bush Doesn’t Care About Black People”, Youtube, Shockroc1, April 16, 2006.

federal government's slow response to Hurricane Katrina, the hip hop duo, The Legendary K.O. created a song with this title in protest. West's outburst predictably functioned as both the song's title and its chorus. As Boyle observes, "Appropriately, given that Mr. West was the one to come up with the phrase, the song was built around Mr. West's 'Gold Digger.'"<sup>277</sup>

The musical basis for "George Bush Doesn't Care About Black People" itself prominently features a borrowing from Ray Charles. During the intro of "Gold Digger," Jamie Foxx sings an interpolation of "I Got A Woman" with altered, parodic lyrics, suggesting the opposite of the Ray Charles original, in which the woman is faithful, generous and modest.<sup>278</sup> The rest of the song features a sample from Charles's original recording, with the original lyrics restored. After some impressive research tactics, Boyle concludes that the sampled Ray Charles song is likely modeled on the Bailey Gospel Singers' song "I've Got a Savior," rather than the usually attributed "Jesus is All the World to Me."<sup>279</sup> Boyle observes "Charles's borrowing is particularly overt and direct. The term 'rewording' is appropriate."<sup>280</sup> In turn, the Bailey Gospel Singers' song is not entirely "original" either. "I've Got a Savior" was based on the older spiritual "Ain't That Good News,"<sup>281</sup> suggesting creation in a greater musical tradition of borrowing, elaboration, and commentary. Thus the origin of the viral "George Bush Doesn't Like Black People" resembles Medieval works with borrowed elements. There are so many layers of borrowing that it becomes difficult to disentangle the numerous artists' contributions. The result of multiple generations of borrowing, "George Bush Doesn't Like Black People"

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<sup>277</sup> Boyle, 125.

<sup>278</sup> Boyle, 139. Foxx's appearance in the interpolation of this track was inspired by his portrayal of Charles in the film *Ray*.

<sup>279</sup> Boyle, 133.

<sup>280</sup> Boyle, 133.

<sup>281</sup> Boyle, 133

illustrates openness of African-American artists to borrow, and how borrowing does not compromise originality, but instead enhances the historical significance of the resulting work. A copyright system based on *notation* does not accommodate composite works, since strictly speaking each infringes the work that comes before, but the resulting works transform the originals' meaning to the extent that they should be protected as fair use.

This final case study was still evolving as the present thesis was submitted. "Bacon Pancakes / Empire State of Mind" is a short mashup combining a jingle from late night cartoon *Adventure Time* with the instrumentals and vocal hook of Jay-Z's and Alicia Keys's "Empire State of Mind." Though not as illuminating as "Knock Out Eileen" as a focused commentary on genre and dialogue, "Bacon Pancakes/Empire State" illustrate how remix elements circulate, and the original materials mutate in the process.

The original jingle was from *Adventure Time* episode "Burning Low," which originally aired on Cartoon Network July 30, 2012. *Adventure Time* songwriter Rebecca Sugar composed the "Bacon Pancakes" jingle, and recorded a demo for the reference of the cartoon's voice actors. She published her demo with just voice and ukulele on the day that the episode first aired.<sup>282</sup> Voice actor John DiMaggio interpreted the jingle in the voice of his character, Jake, while the character is cooking bacon<sup>283</sup> and pancakes.<sup>284</sup> Though the song is only incidental to the episode's plot, online remixers quickly recognized the potential of the 11-second jingle, with remixes appearing in July and August of 2012. The

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<sup>282</sup> "Rebecca Sugar Adventure Time Demo 'Bacon Pancake.'" YouTube video, 0:26. Posted by robsugar, July 30, 2012.

<sup>283</sup> Bacon seems to be a meme in its own right, adding to the popularity of "Bacon Pancakes." For an informative though not wholly scholarly look at the history of the Bacon meme, see Zachary Giaramita, "Bacon," *Know Your Meme*, <http://knowyourmeme.com/memes/subcultures/bacon>.

<sup>284</sup> "This jingle will ruin your life-Bacon Pancakes." YouTube video, 1:31. Posted by emptyeyepoet, August 10, 2012.

first notable remixes appeared in late August and early September. On August 26, Ryden Ridge Remix published an electropop remix emphasizing the jingles tunefulness.<sup>285</sup> By September 4, The Noxious published a dubstep/hardstyle remix that used the original jingle as the raw material for a new song.

The most successful remix, however, was a short mashup of “Bacon Pancakes” with “Empire State of Mind.” Occasional mashup producer and self-imagined social media icon Marcus Coronel published the mashup on his personal Tumblr and YouTube on September 1, 2012.<sup>286</sup> Providing the instrumental ground, “Empire State of Mind” already features a sample, from the piano track of The Moments’ 1970 song “Love On a Two Way Street.” Coronel’s version does not include Jay-Z’s rap, but instead uses the instrumental and Keys’s vocal hook. The original mashup was only 57 seconds long, but it soon became very popular on YouTube. “Bacon Pancakes/Empire State of Mind” was even featured on The Huffington Post on November 26, 2012.<sup>287</sup> Around this time, YouTube users began reposting “Bacon Pancakes/Empire State” without attributing the mashup to Coronel. He took great offence, and posted a video response to clarify that he, in fact was the original creator of the mashup.<sup>288</sup> Coronel’s video response is laden with possessive language that is somewhat shocking for remixer who uses borrowed elements himself. In order to prove that he created the mashup, Coronel holds a laptop that displays a digital workstation up to

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<sup>285</sup> “Adventure Time: Bacon Pancakes (Ryden Ridge Remix).” YouTube video, 1:54. Posted by RydenRidgeOFFICIAL, August 26, 2012.

<sup>286</sup> “Bacon Pancakes vs. Empire State of Mind (Official Video).” YouTube video, 0:57. Posted by Marcus Coronel, November 28, 2012.

<sup>287</sup> *The Huffington Post*, “‘Adventure Time’ & Jay-Z Mashup: ‘Bacon Pancakes’ Meets ‘Empire State of Mind,’” November 26, 2012. [http://www.huffingtonpost.com/2012/11/26/adventure-time-jay-z-mashup\\_n\\_2191910.html?utm\\_hp\\_ref=teen](http://www.huffingtonpost.com/2012/11/26/adventure-time-jay-z-mashup_n_2191910.html?utm_hp_ref=teen)

<sup>288</sup> “Bacon Pancakes Empire State of Mind OFFICIAL CREATOR!! HELLO FELLAS HERE I AM.” YouTube video, 1:22. Posted by Marcus Coronel, December 3, 2012.

his camera; he mutes and unmutes each track, finally letting the mashup play with both instrumentals and vocals. His complaint seems to have been somewhat effective: some subsequent remixes add links to Coronel's Tumblr where the mashup was first published.

On November 23, Shang Gao posted a full song version of the mashup to YouTube, including a link to Coronel's original Tumblr post. This version adopts the structure of "Empire State of Mind," and includes Jay-Z's rap and vocal interjections over Keys's hook. Jay-Z's first verse begins at 1:26, and its combination with Jake's *Adventure Time* jingle creates a dense and challenging texture. The multiple vocal tracks' completely unrelated lyrics further complicate this section. It is unclear whether the jingle or the rap occupies the foreground, a verbal confusion that evokes the polytextual Medieval motet. The result is quite literally polyphonic, with multiple voices vying for textural prominence. Jay-Z's verse features references to New York boroughs and landmarks, as well as references to other songs about New York. In a clear gesture towards a previous New York anthem, he raps, "I'm the new Sinatra, and since I made it here, I can make it anywhere."<sup>289</sup> Indeed, the title itself is a reference to Billy Joel's "New York State of Mind." The full song version of "Bacon Pancakes/Empire State of Mind" illustrates the many-layered, composite nature of online remixed music: a hip hop track featuring a sample and lyric references to other songs converses with a cartoon jingle to create an original, polyphonic work.

Other versions of "Bacon Pancakes/Empire State of Mind" continued to surface on YouTube at the time of this thesis submission. Notable examples include a 10-hour loop of

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<sup>289</sup> Obviously referencing Kander and Ebb's "Theme from *New York, New York*."



the mashup,<sup>290</sup> a reenactment of the mashup video with puppets,<sup>291</sup> and most recently a “goat edition” featuring a goat’s shriek on the sustained last note of the “Bacon Pancakes” jingle.<sup>292</sup> “Bacon Pancakes/Empire State of Mind” collides with other popular memes of the moment, creating more composite pieces of music and video without the need for music notation. Although “Bacon Pancakes” may seem like a poor choice for a final case study since it does not feature the same valuable social or musical commentary of “Knock Out Eileen” or “George Bush Doesn’t Care,” the brief history of its circulation gives a glimpse of how remix artists borrow, share, and reinterpret materials from a shared cultural vocabulary. Like the other case studies, “Bacon Pancakes/Empire State of Mind” is meaningful to those who understand the cultural references, and is humorous in its unlikely and absurd combination of songs that are only compatible by chord progression. Listeners respect the “audile listening” technique of the artist who assembled these disparate parts. A YouTube commenter on the “Bacon Pancakes” electropop remix posted on March 14, 2012 that this “[i]s kind of the point. Finding joy in the seemingly mundane.”<sup>293</sup> These remix artists celebrate both the mundane and the absurd in “Bacon Pancakes/Empire State of Mind”; even if the commentary is not as deep as “George Bush Doesn’t Care,” the music is just as enjoyable.

Bracketing a fair use analysis, all of these case studies infringe their source materials. They take and combine substantial aspects of the original songs, like

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<sup>290</sup> “Makin’ Bacon Pancakes, New York Style – 10 Hour Blend.” YouTube video, 10:00:00. Posted by 10HourVideoChannel, November 25, 2012.

<sup>291</sup> “Bacon Pancakes-New York, puppet style.” YouTube video, 0:43. Posted by mewobots, November 24, 2012.

<sup>292</sup> The goat’s shriek is taken from a compilation of “Goats yelling Like Humans.” “Adventure Time – Bacon Pancakes New York (Goat Edition.” YouTube video, 46. Posted by mknlsndotcom, March 4, 2013.

<sup>293</sup> YouTube comment, “Adventure Time: Bacon Pancakes (Ryden Ridge Remix),” accessed March 12, 2013. <http://www.youtube.com/watch?v=3sMT3wCYRxo&list=PL014X80hQnrXebEYUmsFFn-YvE3axumTj>

instrumentals, vocals, or lyric hooks with the same or complementary elements from other songs. The resulting remixed music circulates online, exchanged without the use of notation for non-commercial purposes. However, given the rights that content owners have in these songs, they could make legitimate claims to have these remixes removed due to infringement. In the previous chapters, this thesis has demonstrated that creators employed these same borrowing procedures even before music was preserved in notation. If copyright serves to promote creativity and protect creators, one must now ask which creations and creators it can and should protect. The remixed music presented in this chapter is original, even though it uses borrowed elements. The threshold for originality is too high when works like these are at risk of censure, since the original works, in which copyright unquestionably subsists, also contain borrowed elements. Both “Gold Digger” and “Empire State of Mind” serve as the musical foundations of remixes, though they themselves include borrowed elements. The only difference between Kanye West’s and Jay-Z’s borrowings and that of The Legendary K.O. and Coronel and Gao is that West and Jay-Z had the *willingness* and *means* to license their samples, and the online remix artists did not. Both “originals” and remixes constitute cultural composites, though some borrowings are more obvious than others. Music with borrowed materials inevitably forces borrowed and new elements to converse in a variety of ways, many of which are quite productive to a continuing musical discourse, all of which are oral. They contribute to an ongoing musical dialogue, and should be allowed to circulate freely.

## Recommendations and Conclusion

This short conclusion argues that the circulation of works featuring borrowed elements should continue, due to their contributions to an ongoing cultural dialogue. Ideally, the following recommendations would demonstrate how copyright could accommodate musical borrowing on its own, oral terms. Imagining exactly what a copyright system that truly accommodates oral practice would look like is beyond the scope of this project. Such a system would likely constitute a significant overhaul of current legislation. Nevertheless, some small changes, both in terms of legal interpretation and licensing practice, could make it easier for works with borrowed, recorded elements to

circulate. First, noncommercial works should not be subject to commercial licensing expectations. Second, practitioners and sampling professionals should rethink thresholds for originality and de minimis sampling, so that even some commercial samples would not require a license. Third, I recommend some methods for redistributing the revenues from sample licensing to compensate not only the owners of publishing rights and masters but also authors and performers of sampled works.

Mashups circulate for free online because their creators either do not have the luxury to afford sample licenses, or they oppose the licensing process altogether.<sup>294</sup> However, mashups that circulate outside of commercial exchange should be exempt from sample licensing, since no money is exchanged for the borrowed music, and it does not compromise the market for the originals. If Justice Souter believed that a commercially circulating parody did not impinge upon the borrowed song's original market, then surely a noncommercial work would not do so either.<sup>295</sup> When a mashup is circulated in its community without any exchange of funds, no licensing fees are owed to the sampled artists either. One might argue that any use of pre-recorded music should be compensated, whether the resulting work circulates commercially or not. The original recording was expensive to create, and the original artists should be compensated for that work. However, this argument risks treading into the territory of *Bridgeport*, which argues that no musical borrowing is too small to be compensated. As the case studies in Chapter 4 demonstrate, even the "original" works that mashup artists borrow are themselves

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<sup>294</sup> Many remix artists self-identify as "pirates" or criminals, détournant the language that has been thrust upon them from the dominant culture. Since some mashup artists are quite young, it is also possible that they are unaware of sample licensing requirements. See John Shiga. "Copy-and-Persist: The Logic of Mash-Up Culture," *Critical Studies in Media Communication* 24 no. 2 (June 2007), 108.

<sup>295</sup> As in *Luther R. Campbell et al. v. Acuff-Rose Music, Inc.*, 510 US 569, LEXIS 2052 (March 7, 1994) at \*573. See also Chapter 4.

composites, and not all of their borrowed elements are secured with sample licenses (take the spirituals borrowed in “I Got A Woman”). Furthermore, the “original artists” seldom enjoy the proceeds of sample licensing, since it is the owners of their works and master recordings that collect on licenses. Submitting online remix artists to the same standards as commercially successful recording artists is unfair. Doing so limits creativity and misunderstands the exchange of mashups online. Mashup artists should be able to use all musical materials as if they had reverted to a public domain, similar to the conditions of Creative-Commons-style licenses.<sup>296</sup> They should be free “to copy, distribute, display, and perform the work; [and] to make derivative works.”<sup>297</sup> When the circulation of the mashup is noncommercial, no license from the sampled artists or the copyright owner should be required. Attribution, however, is important. It is valued in mashup communities,<sup>298</sup> and may ultimately benefit sampled artists by renewing interest in their work.<sup>299</sup> Any derivative works made from the resulting mashups may only be circulated by this same Attribution-NonCommercial license (the “Share Alike” clause). When there is no copyright system in place, as in the Middle Ages, artistic materials are treated as if they were part of a public domain. Approaching pre-existing musical materials in this way presents challenges for both copyright and the established sample-licensing system.

A reconsideration of originality and de minimis thresholds is relevant to both commercially- and non-commercially-exchanged mashups. Given the outcomes of *Grand*

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<sup>296</sup> See the license at <http://creativecommons.org/licenses/by-nc-sa/2.5/ca/legalcode.en>

<sup>297</sup> “Creative Commons: Attribution-NonCommercial-ShareAlike 2.5 Canada” at <http://creativecommons.org/licenses/by-nc-sa/2.5/ca/>

<sup>298</sup> Even collage-mashup artist Girl Talk lists the sources of his samples when releasing an album.

<sup>299</sup> For example, Afrika Bambaataa renewed interest in obscure Disco, R&B, and Funk records. Hip hop artists inspired by Bambaataa chose to sample from the same repertoires, creating such a demand that some of these “forgotten” records were re-released. See Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Durham, NC: Duke University Press, 2011), 55-57.

*Upright* and *Bridgeport*, it is apparent that the courts' thresholds for originality and de minimis should be revised. Appropriate thresholds should be decided on a case-by-case basis when disputes arise, but all parties involved in sampling and licensing should entertain a more liberal understanding of de minimis. For the purposes of these recommendations, the thresholds of de minimis and originality are closely related. The opinions expressed in *Grand Upright* and *Bridgeport* demonstrate high standards of originality and low de minimis thresholds. By these thresholds, the small borrowings of *Grand Upright* and *Bridgeport* (a chord progression and three words, and two seconds of guitar noise, respectively) surpass the de minimis threshold, meaning they are substantial enough to be protected. Songs with borrowed elements do not compromise the markets for the original works, and, especially in the case of *Bridgeport*, do not even borrow passages that are significant to the originals. With a higher de minimis threshold, these samples would not even need to proceed to fair use defenses. If there must be an industry standard of licensing, record labels and content owners should reconsider these thresholds, and consult the opinions of musicologists on the substantiality of musical borrowings with regards to the original works when deciding whether or not to seek a license.

### **Reforms to Commercial Licensing**

Although the works discussed as case studies in Chapter 4 circulate noncommercially, some mashup artists do sell their work, which is why some recommendations on the subject of commercial licenses are relevant here. Usually when samples or songs are licensed for commercial use, it is the copyright owners who benefit, and not the artists who originally created the work or recording. When a creator borrows to make a new musical work, sample-licensing fees should be distributed equally between

creators (performers, songwriters, and lyricists), and content owners.<sup>300</sup> In some cases this would be difficult, since the names of session musicians are not always recorded, but the model is still valuable all the same, and especially worthwhile for oft-sampled individuals like “Funky Drummer” performer Clyde Stubblefield. While the original artists’ permission would not be required to obtain a license, attribution in the final product would be necessary. Commercial licensing for film, television, advertising, and other public uses may remain exclusively to the benefit of the copyright owners, but when recorded music is used transformatively to create a new song, the musical creators and performers should be compensated.

The licensing process could also be streamlined by the creation of a single licensing agency and an affiliated copyright database, which would simplify transactions for both content owners and artists. An agency of this type would have to be government-owned to ensure neutrality in sampling transactions, and could function in association with a national archive or library to assist with research questions. Current sample licensing requires extensive research regarding the ownership of a given work (since it may have been transferred multiple times), the owner of the recording, and the location of these owners. All of this research consumes many hours of licensing professionals’ and copyright specialists’ time, driving up the overall transaction costs of obtaining a sample. By centralizing licensing transactions, and creating a database, licensing fees would decrease

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<sup>300</sup> McLeod and DiCola cite the famous example of the “Funky Drummer” sample, performed by James Brown’s drummer Clyde Stubblefield. His drum break is perhaps the most used sample of all time. Though Brown structured the song on Stubblefield’s improvisation, he did not receive authorship credit or any compensation beyond his daily performer wage. See Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling*, (Durham, NC: Duke University Press, 2011), 90-92.

since they would take less time, making the practice more appealing to both artists and content-owners alike.

Though these recommendations still do not accommodate sampling as oral music practice, they do provide some small changes that would make sampling more feasible. As Chapter 2 demonstrates, copyright, and music copyright especially, evolves slowly, changing to reflect changes in technology. In the case of music, copyright failed to evolve to adequately accommodate the differences between scores and recordings. By submitting recordings to the same standards as notated music, copyright does not account for the musical borrowing of recordings practiced in sampling and the mashup. Musical works with borrowed elements have value, and they promote further creativity. If the purpose of copyright is to promote this creativity, remixed music with borrowed elements should be protected, and allowed to circulate freely.

Copyright does not accommodate remixed music with borrowed elements because the practice of borrowing is oral, and copyright was created to protect printed commodities. This thesis examined contemporary practices of sampling and online music remix culture through the lens of a broader history that includes the communal creation of the Middle Ages. This historical approach not only demonstrated that borrowing is a fundamental part of musical creativity, but also irreverently undermined assumptions about single authorship, proving that a borrowed element both functions differently and creates meaning differently for those communities in which it is exchanged. Borrowing is only meaningful when practiced within a community. An author's attempts at signifying something by borrowing are only fully realized when the references are heard and understood by an audience. Though notation may be involved in this process, borrowing



relies more on hearing and speaking, making it an oral practice within music. The same is true when creators use recorded elements. In fact, this lessens the need for notation, making borrowing in online music remix culture more closely related to music cultures that rely upon oral transmission, rather than those that primarily use notation.

Creators make the decision to borrow from a pre-existing work not for any lack of originality, but because they mean something by doing it. Their objectives are varied and depend on the individual work: they may attempt to place the new work in an existing tradition; to provide a critical commentary on the original work; to appeal to the audience by using familiar materials; or to use materials from the past to create a new, avant-garde aesthetic. If copyright compromises creators' abilities to create meaning in this way, works of the past would become untouchable, immune to both criticism and homage. By limiting musical creators' ability to borrow, copyright limits a unique historical dialogue that takes place *in music* itself. The commentaries expressed in hip hop and online remixed music constitute reflexive musicologies. Rather than using scholarly prose to reflect on issues including genre, authenticity, and originality, artists use music itself, borrowing from the past to make arguments about the present, or at least about issues that are presently relevant. This too has been the methodology of this thesis: I took works from the past, and past ways of creating meaning, and used them to illuminate the present incompatibilities between the law and specific forms of musical practice. My approach attempts to participate in dialogue with the past, one that might inform how to promote creativity by making small amendments to the application of copyright law.

I argued that online music remix culture should be protected because it fosters cultural dialogue, and it does this in a variety of ways. Artists create dialogue within a

mashup. The sampled works speak to each other and these unlikely couplings dialectically produce something new and greater than the sum of its parts. These works also converse with the “originals” from which they borrow, making the originals’ traditions, assumptions, and aesthetics visible and open to scrutiny. A work with borrowed elements might force the listener to reconsider the original in the context of the new, composite work. The circulation of remixed music also fosters dialogue within online (and offline) communities. Listeners assess the success of mashups, the validity of their musical theses, the skill of the artist, and the musical dialogues outlined above. Such communities are driven by lust for a listening pleasure that is challenging and overwrought with cultural references, because listening constitutes participation in a larger dialogue. Music is exchanged within these communities for enjoyment and edification, though not for money. The noncommercial nature of online music remix culture should, by default, exempt it from some types of infringement, since its contributions to cultural dialogue are so much more valuable than any loss of revenue from sampling licenses.

While my recommendations are far from extensive, I believe that they capture the communal spirit of Medieval creation. Artists who borrow refuse the idea that works of art are “autonomous,” are bounded and controlled by an author, or should be immune from play and tampering. Artists make valuable criticisms when they are able to borrow large parts of pre-existing works, criticisms that should be protected given their contributions to musical discourse. Like comedic forms of criticism, including parody and satire, mashups can expose prejudices and reveal longstanding musical biases about “originality.” It is crucial that listeners become more aware of the prejudices and conventions that arise with monopolistic artistic production. Though sample licensing will not be eliminated any time

soon, it should be reformed, for the ease of remix creators and the benefit of the original artists who are so often overlooked. If copyright is also reformed to better accommodate the oral exchange of online remix culture, the future will indeed be Medieval, rich with a variety of musical voices contributing to a free and communal exchange of ideas.

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de puis. qui einsi mamez soupris. merci  
 poe de.

**N**est pas amis qui se restant. da  
 moit por meschies endurer. mais o plus  
 le griue et atant. et plus doit loian  
 ment amier. si li veill moultier. dex. qn  
 si laun sanz desliuer. he. dame ientiz.  
 humles cuer et douz et puis. merci por  
 de.

**E** ie maintieg loial amoz. se dieu  
 plaist iauerz merci. si maut dex de ma  
 dolor. o ie laun plus que ie ne di. et por  
 ce li pri. dex. que moi ne mette en oubli.  
 he. dame d'at. douz samblanz. vis de  
 douz. merci vos cri.

**C**rop aenli seut et valor. et abiaue  
 na pas failli. ex arant fresche color. et  
 toz li cuer men eslor. quant premier la  
 vi. dex. tant est gent li cors de li. he. da  
 me au cors gent. cui iame si loiaumet.  
 merci vos cri.

**E**i douz penser que ian adef. de li ser  
 uir amon poir. me tient toz iors et  
 loig et pres. de la merci en bon espoir. si  
 li faz sauoir. dex. que siens sui por mair  
 valoir. he. dame vallans. et cortoise.  
 et bien parlant. merci vos pri.

**C**hanconete au voir. li di quere a  
 son voloir. sanz deceuoir. *li moines de s. de*  
*ms*

**E**nnon dieu cest la rage. que  
 li maus d'amois. si ne ma  
 soage. ne puis souffrir son outrage.

mon corage en retentat. de li partnai  
 mais nest pas par p. moi. car quant  
 la vi la vi la vi. la bele la blonde ah  
 motui.

*li moines de saint dems.*  
 moit ma apuse rente. tele  
 qui ne puet faillir. adef

**Appendix A-2: “En Non Dieu, C’est La Rage.”** Transcription by Judith Peraino,  
 “Monophonic Motets: Sampling, and Grafting in the Middle Ages.” In *The Music Quarterly*, 85 no. 4 (Winter 2001), 647.

8 En non Dieu c'est la \_\_\_\_\_ ra - ge

2 8 que li \_\_\_\_\_ maus d'a mours \_\_\_\_\_ s'il ne m'a - so a - ge

3 8 Ne puis \_\_\_\_\_ sou - frir son \_\_\_\_\_ ou - tra - ge \_\_\_\_\_

4 8 mon co - ra - ge en re - tra - rai

5 8 de li par - ti - rai

6 8 Mais n'est pas par \_\_\_\_\_ moi \_\_\_\_\_

7 8 car \_\_\_\_\_ quant la voi la voi la voi

8 8 la be - le la blon - de a \_\_\_\_\_ li \_\_\_\_\_ m'o - troi \_\_\_\_\_

**Appendix A-3 “En Non Dieu, C’est La Rage.”** Translation by Judith Peraino, 647.  
*“In the name of God, lovesickness is madness if I have no relief / I cannot suffer this outrage, I will withdraw my heart and take my leave of love / But it is not in me, for when I see her, see her, see her, the beautiful, the blonde, I grant myself to her.”*



Appendix B-1: "Chançon Ferai" F-Pn fr. (Chansonnier Cangé) BNF 846, fol. 21v-22r.  
 Accessed at gallica.bnf.fr





fust ceste se der iore me dont. de  
moi li fust. auent pitiez prise.  
qui sui toz siens et si a la deuse  
pitiez de cuer der que ne sest as  
si se en la beaute dame cui mer  
ci priot. se sent les maus d'amer

por uos. sentez les uos por moi.  
**D**ouce dame sanz amor sui  
radis. quant ie choisi ure gen  
te facon. q'it ie ui ure tres bi  
au cleruis si me raprist mes  
cuerf autre raison. de uos am  
me seimont. iostise a uos en  
est aure com adise. li cors re  
mante qui sent selon ioste se  
ne auez meret de ure gre. Li  
douz maus dont iarent iore  
mors si greue. moz sui selem  
delance. **M**out a amor grant  
force. i grant pour qui sanz  
raiso fait choisir a son gre. sa

raison der. ie ne di pas sauoir.  
car a mes cuer en for mes cuers  
bon gre. qui choistrent si tres be  
le semblance dont iames ior ne  
ferai desleirance. amz souffrirai  
por ligret penitence tant que pi  
tez et meret. leu prendra. ou ar  
uol qui mon cuer emble ma. li  
douz ris. li bel hui quele a.

**D**ouce dame fil uos plest. i.  
soit maniere. plus de iore donee  
le conquest cristianz. qui en fist son  
pour nen por auoir nul ior de  
son ac. la moie est toz nee a pesa  
ce. lecor sanz cuer de uos fait gnt  
ueniance cele qui nra nature sa  
deffiance. i no por q'it ie ne la lai  
rai na. l'endoit bien bele dame a  
mer. i samoz garder qui laura.

**D**ame por uos vult aler folo  
ant. que ie en ai mes maus i ma  
dolor. que plet maus ma grant  
ioie en acient. q'ien aurai se deu  
plait a uos ior. amor meret  
ne soiez obliee. for me faillie.  
ciert trahison doublee. q' mes  
gnt maus por uos si fort image.  
ne me mettez. loquent en obli  
se la bele ne a de moi met. ie ne  
unirai mie lone temps ensi. la  
gnt biance. qui mes pnt i agre  
e qui for toutes est la plus desir  
ree. ma si l'acie mo cuer en sa pn  
son. der ie ne pait sa li no. amor  
q' ne pansé ele donc.

**Appendix B-2: “Chançon Ferai.”** Translation Kathleen J. Brahney, ed., trans., *The Lyrics of Thibaut de Champagne*, Garland Library of Medieval Literature (New York: Garland Publishing, 1989), 38-41.

<p>Chançon ferai, car talent m'en est pris, de la meilleur qui soit en tout le mont. De la meilleur? Je cuit que j'ai mespris. S'ele fust tex, se Dex joie me dont, de moi le fust aucune pitié prise qui sui touz siens et sui a sa devise. Pitiez de cuer, Dex, que ne s'est assise en sa biauté? Dame, qui merci proi, <i>je sent les max d'amer por vos, sentez les vos por moi?</i></p> <p>Douce dame, sanz amor fui jadis quant je choisi vostre douce façon, et quant je choisi vostre tres biau cler vis, si me raprist mes cueurs autre reson: de vos amer me semont et justice; a vos en est a vostre commandise. Li cors remaint, qui sent felon juïse, se n'en avez merci de vostre gré. <i>Li douz maus dontj'atent joie m'ont si grevé, mort sui s'ele m'l delaie.</i></p> <p>Mult a Amours grant force et grant pouoir, qui sanz reson fet choisir a son gré. Sanz reson? Dex, je ne di pas savoir, car a mes euz en set mon cuer bon gré, qui choisirent sit res bele semblance, don't jamès jor ne ferai desevrance; ainz sousfrirai por li grief penitence tant que pities et merciz l'en prendra. <i>Diré vos qui tot mon cuer enblé m'a? Li douz ris et le bel oeil qu'ele a.</i></p> <p>Douce dame, s'il vos plesoit un soir, m'avrière vos plus de joie doné c'onques Tristans, qui en fist son pouoir, n'en pout avoir nul jor de son aé. La moie joie est tornee a pesance; hé, cors sanz cuer! de vos fet gran venjance, cele qui m'a navré sanz defiance, et ne por quant je ne lerai ja.</p>	<p>Since desire has overtaken me, I shall write a song, About the best lady in all the world. The best? I think I've made a mistake. If she were, if God would grant me joy, She would have taken pity on me, For I am entirely hers and at her mercy. Of such a beauty? Lady, of whom I beg mercy,</p> <p><i>I feel love's sufferings for you, Do you feel them for me?</i></p> <p>Sweet lady, I was once without love, When I beheld your sweet manner; And when I saw your beautiful fair face, My heart began to speak differently: It summons and commands me to love you and is entirely within your sway. The body remains, feeling cruel torment, If you take no pity on t of your own accord. <i>The sweet pains from which I await joy Have wounded me so That I shall die if she makes me wait.</i></p> <p>Indeed has Love great strength and great power To choose at will, without reason. Without reason? God I cannot say that I know, For my heart is grateful to my eyes For having seen one so fair That I shall never suffer severe penance for her, So that pity and mercy will overcome her.</p> <p><i>Will you say who has stolen my heart? Her sweet smile and her beautiful eyes.</i></p> <p>Sweet lady, if it pleased you, in one evening You could give me more joy Than Tristan, who did all in his power Ever had any day of his life. My very joy is turned to grief; Ah! body without a heart, She who has wounded me so gravely Has wrought great vengeance upon you,</p>
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<p><i>L'en doit bien bele dame amer et s'amor garder, cil qui l'a.</i></p> <p>Dame, por vos vueil aler foloaint, que je en aim mes maz et ma dolor, qu'après les max ma grant joie en atent que g'en avrai, se Deu plest, a brief jor. Amors, merci, ne soiez oublïee! S'or me failliez, c'iert traïson double,  que mes granz max por vos si fort m'agree.</p> <p>Ne me metez longuement en oubli. <i>Se la bele n'a de moi merci, je ne vivrai mie longuement ensi..</i></p> <p>Sa grant biautez qui m'esprent et agree,  qui seur toutes est la plus desirree, m'a si lacié mon cuer en sa prison. <i>Dex, je ne pens s'a li non. A moi que ne pense ele donc?</i></p>	<p>And yet I shall never part from her. <i>He who has a beautiful lady's love Must keep it and love her well.</i></p> <p>Lady, for you I wish to go folly's way, For I love my pains and sorrow, For after the sufferings I await great joy Which I shall have shortly, if it pleases God. Love, have mercy! Do not be forgotten! If you fail me now, it would be double treason That my great suffering for you please me so much.</p> <p>Do not let me be forgotten very long! <i>Uf the beautiful one has no pity on me, I shall not live very long.</i></p> <p>Her great beauty, which sets me aflame and pleases me, And is desired far more than all others, Has bound my heart in her prison. <i>God! I think only of her, Doesn't she think of me?</i></p>
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**Appendix C: "Qui Amours Veut Maintenir/Li Dous Pensers/Cis A Cui."** Bibliothèque Interuniversitaire, Montpellier, Section Médecine, MS. H 196. fol. 316-319v. As transcribed in E. De Coussemaker, *L'Art Harmonique aux XIIe & XIIIe Siècles*. Paris: Durand, 1865. Accessed at <http://gallica.bnf.fr>.

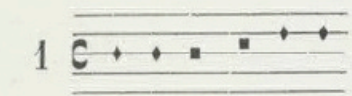
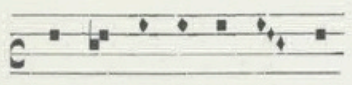
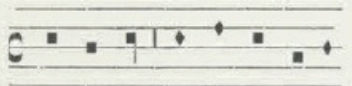
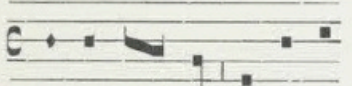
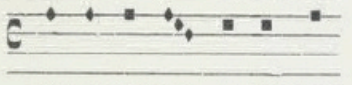
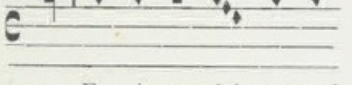
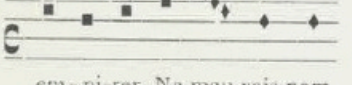
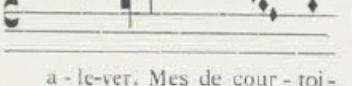
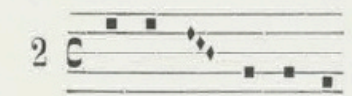
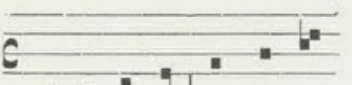
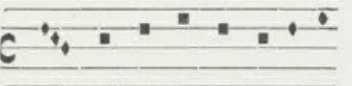
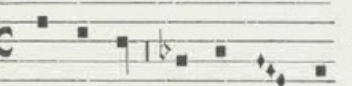
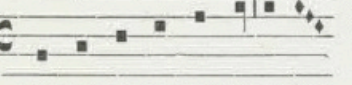
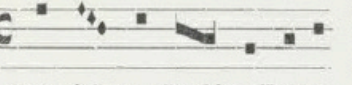
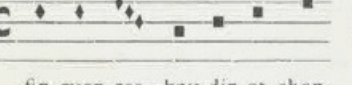
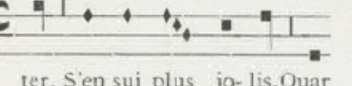
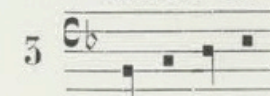
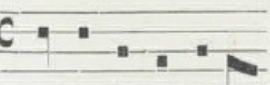
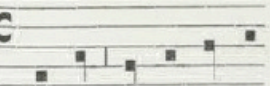
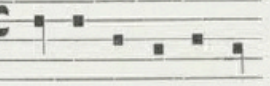
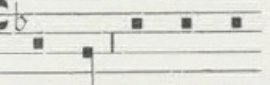
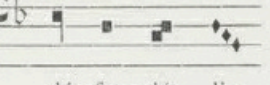
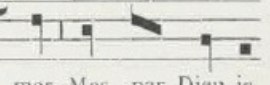
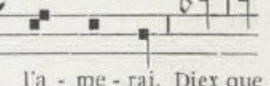
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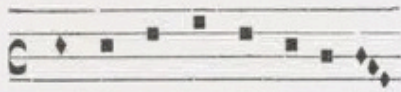
XXXVI

1. QUI AMOURS VEUT MAINTENIR. — 2. LI DOUZ PENSER. — 3. CIS A CUI JE SUI AMIE.

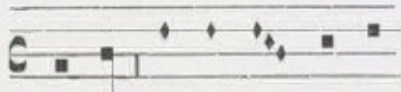
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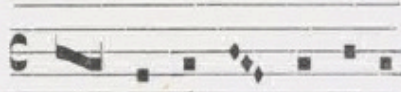
<p>1</p>  <p>Qui amours veut mainte-</p>  <p>nir, Et ser-vir loi - au-ment</p>  <p>sans fausser, Bien se doit sus tou-</p>  <p>tes riens gar-der De vi-la -</p>  <p>ni - e Qui tant a fait blas-</p>  <p>mer, Et si ne doit au-trui</p>  <p>em-pi-rer, Ne mau-vais nom</p>  <p>a-le-ver. Mes de cour-toi-</p>	<p>2</p>  <p>Li douz pen-ser qui me</p>  <p>vient de ce - li, Que j'aim de</p>  <p>cuer, quar tous jours l'ai ser-vi-e</p>  <p>sans gui-ler, Et bons es-poirs</p>  <p>que j'ai d'a-voir merci, Fait ma</p>  <p>grant joi - e dou-bler, Et mon</p>  <p>fin cuer res - bau-dir et chan-</p>  <p>ter. S'en sui plus jo-lis, Quar</p>	<p>3</p>  <p>Cis a cui je</p>  <p>sui a - mi - e, Est coin-</p>  <p>te et gai; Por s'amours se-</p>  <p>rai jo - li - e, Tant com</p>  <p>vi - vrai. Vous le me</p>  <p>dé - fen - dés l'a-</p>  <p>mer, Mes par Dieu je</p>  <p>l'a - me - rai. Diex que</p>
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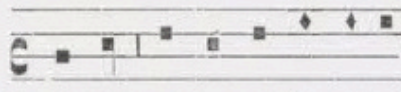
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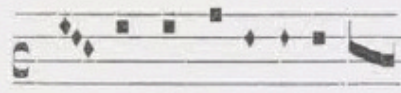
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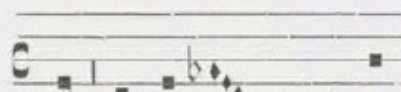
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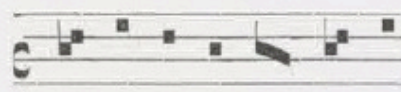
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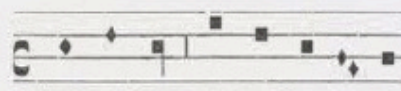
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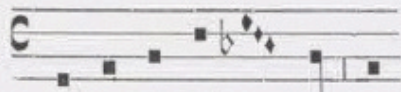
ver. Diex les puist tous a-gra-



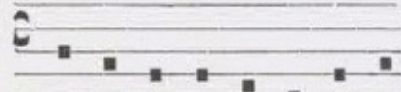
ven-ter, Car je ne les por-



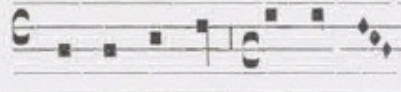
roie a-mer. Mes qui bo-ne vie



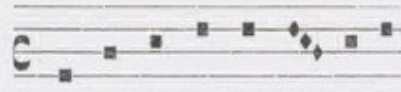
nus ne por-roit pen - ser, La



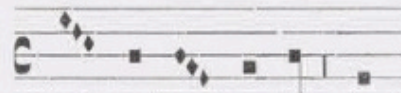
grant biau-té por qui je sui si



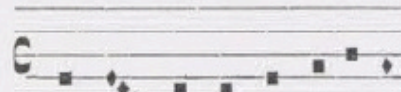
pris et es-pris; Tant est plai-



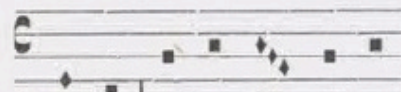
sant et de be - le fa-çon Ce-



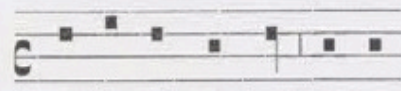
le à cui sui a-mis. Plai-



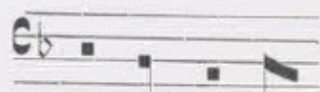
ne est de bon-té de valour et



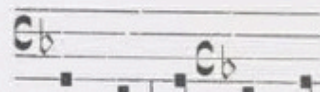
de pris, De cour-toi - sie et



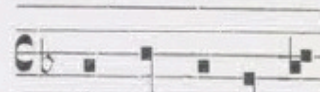
de très grant re-nom. S'en est



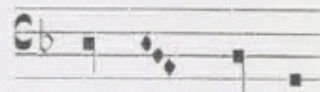
fe - rai du mal



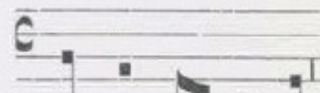
d'a-mer, Qui ne me



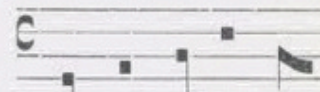
les-sent du-rer. Hé



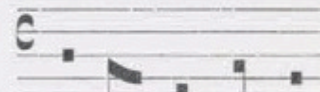
a - mou - re - tes



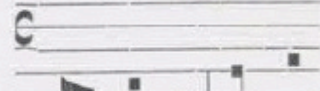
m'oc - ci - rés vous donc.



E - le m'a na - vré

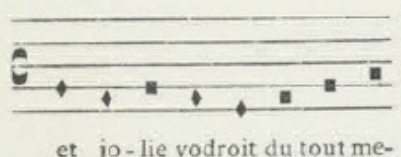
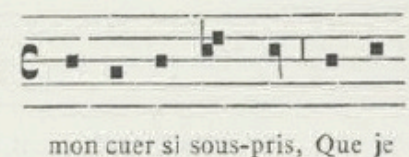
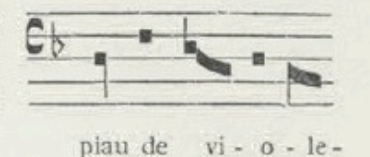
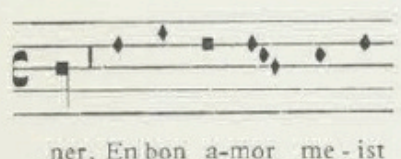
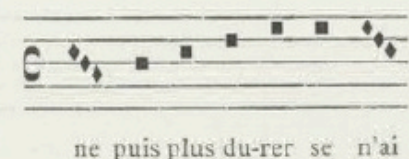
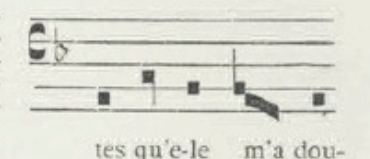
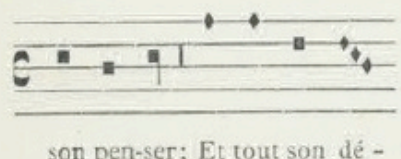
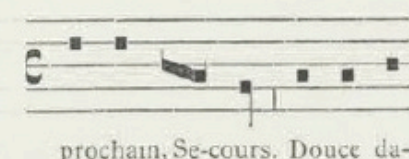
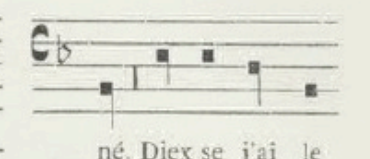
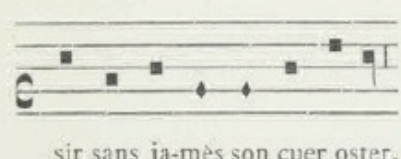
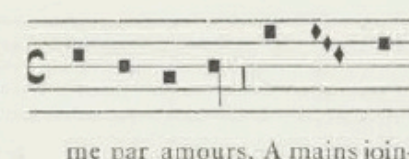
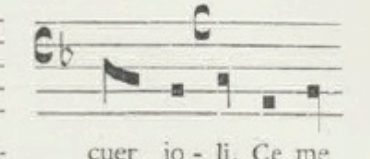
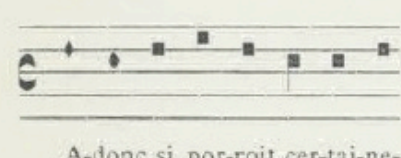
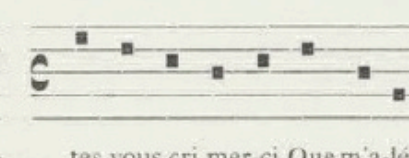
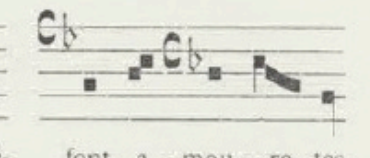


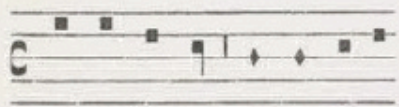
la bé - le, el - le



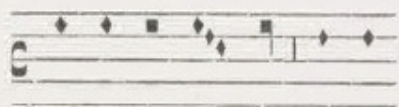
m'a na - vré. D'un cha-



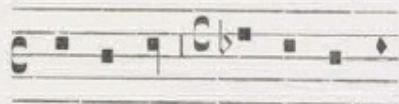
		
		
		
		
		



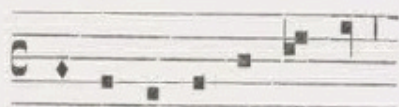
vi - ai - re cler, Tou-te douleur



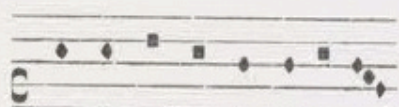
es-tuet ou-bli - er. Et por-



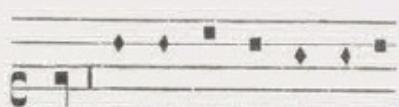
dé-por-ter, Fait bon touz-dis



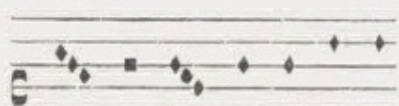
sa grant valour remembrer,



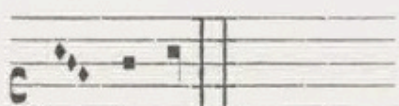
K'on doit bien ser-vir et hounou-



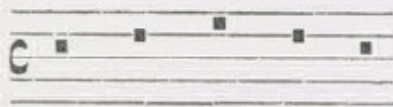
rer Ce - li qui po-oir a de



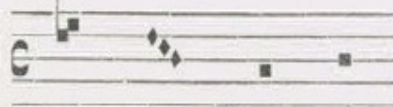
tous maus a - lé-gier Et guer-



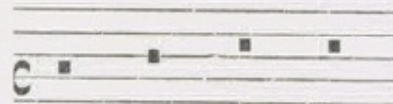
re - dou-ner.



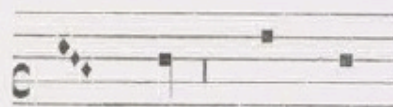
ne por tor - ment, Souf-



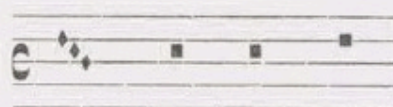
frir ne m'en - quier



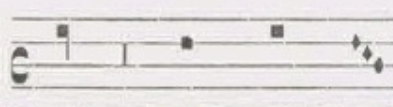
de par - tir à



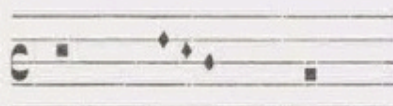
nul jour. Et se



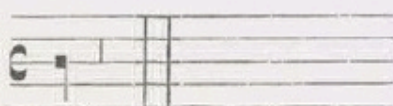
j'ai la vos - tre a -



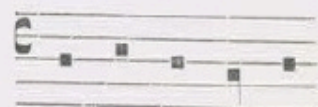
mour, Mis m'a - vés



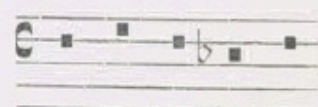
en grant bau -



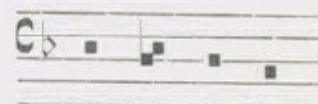
dour.



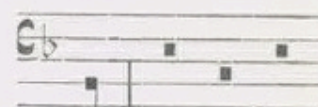
rai d'a-mou - re - tes,



Car je ne puis en



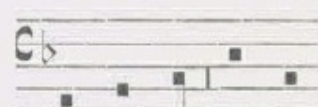
li mer - ci tro -



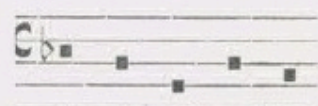
ver. Or du des-



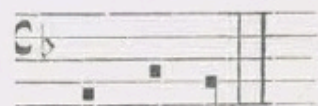
train-dre et du me-



tre en pri-son, Je l'a-



me -rai qui qu'en poist



ne qui non.

# Curriculum Vita

## Claire Elizabeth Anne McLeish

Areas of Interest: Popular Music, Medieval Music, Music and Copyright, Musicology.

### Education

#### **University of Western Ontario**

- ❖ M.A. Candidate, Popular Music and Culture, 2011-2013
- ❖ Bachelor of Music (Honors) Major in Music History, 2006-2011
- ❖ Bachelor of Arts, Major in Popular Music Studies, Minor in English, 2006-2011

### Professional Experience

- ❖ Research Assistant  
Spring-Summer Term, 2012
- ❖ Graduate Teaching Assistant  
Fall-Winter Term, 2011-2012 & 2013-2013